

EXHIBIT 1

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UNITED STATES DISTRICT COURT
OF THE DISTRICT OF MASSACHUSETTS

-----x

IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION
PRICE LITIGATION : 01-CV-12257-PBS
THIS DOCUMENT RELATES TO :
U.S. ex rel. Ven-A-Care of : Judge Patti B.
The Florida Keys, Inc., : Saris
Plaintiff, :
vs. :
ABBOTT LABORATORIES, INC., : Chief Magistrate
No. 06-CV-11337-PBS : Judge Marianne B.
Defendants. : Bowler

-----x

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Thursday, September 27, 2007

Continued Videotape Deposition of:

LARRY REED,

the witness, was called for examination by counsel
for the Defendants, pursuant to notice, commencing

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<p style="text-align: right;">Page 330</p> <p>1 at 9:15 a.m., at the law offices of 2 Hogan & Hartson, 111 South Calvert Street, 3 Baltimore, Maryland, before Dawn A. Jaques, 4 Certified Shorthand Reporter and Notary Public in 5 and for the State of Maryland, when were present 6 on behalf of the respective parties: 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 (CAPTIONS CONTINUED)</p>	<p style="text-align: right;">Page 332</p> <p>1 IN THE COURT OF THE SECOND JUDICIAL CIRCUIT 2 IN AND FOR LEON COUNTY, FLORIDA 3 THE STATE OF FLORIDA 4 ex rel. 5 -----x 6 VEN-A-CARE OF THE FLORIDA : 7 KEYS, INC., a Florida : 8 Corporation, by and through : 9 its principal officers and : 10 directors, ZACHARY T. : 11 BENTLEY and T. MARK JONES, : 12 Plaintiffs, : 13 vs. : 14 MYLAN LABORATORIES, INC., : Civil Action No.: 15 MYLAN PHARMACEUTICALS, INC., : 98-3032G 16 NOVOPHARM LTD., SCHEIN : 17 PHARMACEUTICAL, INC., TEVA : Judge William L. 18 PHARMACEUTICAL INDUSTRIES : Gary 19 LTD, TEVA PHARMACEUTICAL USA, : 20 WATSON PHARMACEUTICALS, INC., : 21 Defendants. : 22 -----x</p>
<p style="text-align: right;">Page 331</p> <p>1 IN THE CIRCUIT COURT 2 OF MONTGOMERY COUNTY, ALABAMA 3 -----x 4 STATE OF ALABAMA, : 5 Plaintiff, : Case No. 6 vs. : CV-05-219 7 ABBOTT LABORATORIES, : 8 INC., et al., : Judge Charles 9 Defendants. : Price 10 -----x 11 12 13 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT 14 STATE OF HAWAII 15 -----x 16 STATE OF HAWAII, : 17 Plaintiff, : Case No. 18 vs. : 06-10720-04-EEH 19 ABBOTT LABORATORIES, et al., : Judge Eden 20 Defendants. : Elizabeth Hifo 21 -----X 22</p>	<p style="text-align: right;">Page 333</p> <p>1 FRANKLIN CIRCUIT COURT - DIVISION II 2 CIVIL ACTION NO. 03-CI-1134 3 4 -----X 5 COMMONWEALTH OF KENTUCKY, : 6 Plaintiff, : 7 vs. : Judge 8 : Crittenden 9 ABBOTT LABORATORIES, INC., : 10 Defendant. : 11 -----X 12 13 STATE OF WISCONSIN CIRCUIT COURT 14 DANE COUNTY 15 Branch 9 16 -----x 17 STATE OF WISCONSIN, : 18 Plaintiff, : 19 vs. : Case No. 20 AMGEN, INC., et al., : 04-CV-1709 21 Defendants. : 22 -----x</p>

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<p style="text-align: right;">Page 334</p> <p>1 STATE OF SOUTH CAROLINA : IN THE COURT OF 2 COUNTY OF RICHMOND : COMMON PLEAS 3 -----X FOR THE FIFTH 4 STATE OF SOUTH CAROLINA : JUDICIAL DISTRICT 5 and HENRY D. McMASTER : Case No. 6 in his official capacity : 2006-CP-40-4394 7 as Attorney General for : 8 the State of South : 9 Carolina, : 10 Plaintiffs, : 11 vs. : 12 ABBOTT LABORATORIES, : 13 Defendant. : 14 -----X 15 16 17 18 19 20 21 22 (CAPTIONS CONTINUED)</p>	<p style="text-align: right;">Page 336</p> <p style="text-align: center;">A P P E A R A N C E S</p> <p>1 2 3 On behalf of the United States of America: 4 5 ANA MARIA MARTINEZ, ESQ. 6 United States Department of Justice 7 Assistant United States Attorney 8 Southern District of Florida 9 99 N.E. 4th Street 10 Miami, Florida 33132 11 TELEPHONE: (305) 961-9431 12 E-MAIL: Ana.maria.martinez@usdoj.gov 13 -and- 14 JUSTIN DRAYCOTT, ESQ. 15 United States Department of Justice 16 Civil Division 17 P.O. Box 261 18 Ben Franklin Station 19 Washington, D.C. 20044 20 TELEPHONE: (202) 305-9300 21 E-MAIL: Justin.draycott@usdoj.gov 22</p>
<p style="text-align: right;">Page 335</p> <p>1 STATE OF SOUTH CAROLINA : IN THE COURT OF 2 COUNTY OF RICHMOND : COMMON PLEAS 3 : FOR THE FIFTH 4 : JUDICIAL CIRCUIT 5 STATE OF SOUTH CAROLINA : 6 and HENRY D. McMASTER, : 7 in his official capacity : 8 as Attorney General for : 9 the State of South : Civil Action No. 10 Carolina, : 07-CP-40-0285 11 Plaintiff, : 12 vs. : Civil Action No. 13 SANDOZ, INC., : 07-CP-40-0287 14 Defendant. : 15 -----X 16 17 18 19 20 21 22</p>	<p style="text-align: right;">Page 337</p> <p>1 APPEARANCES (Continued:) 2 3 On behalf of Ven-A-Care: 4 5 ROSLYN G. POLLACK, ESQ. 6 Berger & Montague, P.C. 7 1622 Locust Street 8 Philadelphia, Pennsylvania 19103-6305 9 TELEPHONE: (215) 875-4666 10 E-MAIL: rpollack@bm.net 11 12 On behalf of U.S. Department of 13 Health and Human Services: 14 15 LESLIE STAFFORD, ESQ. 16 U.S. Department of Health and 17 Human Services 18 Office of General Counsel, CMS Division 19 7500 Security Boulevard 20 Mail Stop C2-05-23 21 Baltimore, Maryland 21244-1850 22 TELEPHONE: (410) 786-9655</p>

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<p>1 APPEARANCES (Continued:)</p> <p>2</p> <p>3 On behalf of City of New York and New York</p> <p>4 counties:</p> <p>5</p> <p>6 MICHAEL WINGET-HERNANDEZ, ESQ.</p> <p>7 WINGET-HERNANDEZ LLC</p> <p>8 3112 Windsor Road</p> <p>9 Suite 228</p> <p>10 Austin, Texas 78703</p> <p>11 TELEPHONE: (512) 474-4095</p> <p>12 E-MAIL: Michael@winget-hernandez.com</p> <p>13</p> <p>14 On behalf of Abbott Laboratories:</p> <p>15</p> <p>16 DAVID S. TORBORG, ESQ.</p> <p>17 Jones Day</p> <p>18 51 Louisiana Avenue, N.W.</p> <p>19 Washington, D.C. 20001-2113</p> <p>20 TELEPHONE: (202) 879-5562</p> <p>21 E-MAIL: Dstorborg@jonesday.com</p> <p>22</p>	<p>1 APPEARANCES (Continued:)</p> <p>2</p> <p>3 On behalf of GlaxoSmithKline:</p> <p>4</p> <p>5 SHANKAR DURAISWAMY, ESQ.</p> <p>6 Covington & Burling LLP</p> <p>7 1201 Pennsylvania Avenue, N.W.</p> <p>8 Washington, D.C. 20004</p> <p>9 TELEPHONE: (202) 662-5273</p> <p>10 E-MAIL: Sduraiswamy@cov.com</p> <p>11</p> <p>12 On behalf of Bristol-Myers Squibb Company:</p> <p>13 (via telephone)</p> <p>14</p> <p>15 ANDREA W. TRENTO, ESQ.</p> <p>16 Hogan & Hartson LLP</p> <p>17 875 Third Avenue</p> <p>18 New York, New York 10022</p> <p>19 TELEPHONE: (212) 918-3532</p> <p>20 E-MAIL: Awtrento@hhlaw.com</p> <p>21</p> <p>22 (Continued)</p>
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<p>1 APPEARANCES (Continued:)</p> <p>2</p> <p>3 On behalf of Dey, Inc.:</p> <p>4</p> <p>5 NEIL MERKL, ESQ.</p> <p>6 Kelley Drye & Warren LLP</p> <p>7 101 Park Avenue</p> <p>8 New York, New York 10178</p> <p>9 TELEPHONE: (212) 808-7811</p> <p>10 E-MAIL: Nmerkl@kelleydrye.com</p> <p>11</p> <p>12 On behalf of Roxane Laboratories and</p> <p>13 Boehringer Ingelheim:</p> <p>14</p> <p>15 ERIC GORTNER, ESQ.</p> <p>16 Kirkland & Ellis LLP</p> <p>17 200 East Randolph Drive</p> <p>18 Chicago, Illinois 60601</p> <p>19 TELEPHONE: (312) 861-2285</p> <p>20 E-MAIL: Egortner@kirkland.com</p> <p>21</p> <p>22 (Continued)</p>	<p>1 APPEARANCES (Continued:)</p> <p>2</p> <p>3 On behalf of Baxter Health Care Corporation</p> <p>4 (via telephone):</p> <p>5</p> <p>6 EDEN M. HEARD, ESQ.</p> <p>7 Dickstein Shapiro LLP</p> <p>8 1825 Eye Street, N.W.</p> <p>9 Washington, D.C. 20006</p> <p>10 TELEPHONE: (202) 420-2728</p> <p>11 E-MAIL: Hearde@dicksteinshapiro.com</p> <p>12</p> <p>13 On behalf of the State of Alabama (via telephone):</p> <p>14</p> <p>15 W. DANIEL (DEE) MILES, III</p> <p>16 Beasley, Allen, Crow, Methvin,</p> <p>17 Portis & Miles</p> <p>18 218 Commerce Street</p> <p>19 Post Office Box 4160</p> <p>20 Montgomery, Alabama 36103-4160</p> <p>21 TELEPHONE: (334) 269-2343</p> <p>22 (Continued)</p>

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<p style="text-align: right;">Page 342</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of Sandoz, Inc. (via telephone):</p> <p>4</p> <p>5 DAVID L. KLEINMAN, ESQ.</p> <p>6 White & Case LLP</p> <p>7 1155 Avenue of the Americas</p> <p>8 New York, New York 10036-2787</p> <p>9 TELEPHONE: (212) 819-8254</p> <p>10</p> <p>11 On behalf of the State of California</p> <p>12 (via telephone):</p> <p>13</p> <p>14 RITA HANSCOM, ESQ.</p> <p>15 Bureau of Medi-Cal Fraud & Elder Abuse</p> <p>16 Office of the Attorney General</p> <p>17 California Department of Justice</p> <p>18 TELEPHONE: (619) 688-6099</p> <p>19</p> <p>20</p> <p>21</p> <p>22 (Continued)</p>	<p style="text-align: right;">Page 344</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of the State of California:</p> <p>4 NICHOLAS N. PAUL, ESQ.</p> <p>5 Bureau of Medi-Cal Fraud & Elder Abuse</p> <p>6 Supervising Deputy Attorney General</p> <p>7 Civil Prosecutions Unit</p> <p>8 P.O. Box 85266</p> <p>9 110 West A Street, Suite 1100</p> <p>10 San Diego, California 92186</p> <p>11 TELEPHONE: (619) 688-6099</p> <p>12 E-MAIL: Nicholas.paul@doj.ca.gov</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
<p style="text-align: right;">Page 343</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 On behalf of the State of Florida (via telephone):</p> <p>4</p> <p>5 MARY S. MILLER, ESQ.</p> <p>6 Office of the Attorney General of Florida</p> <p>7 PL-01, The Capitol</p> <p>8 Tallahassee, Florida 32399-1050</p> <p>9 TELEPHONE: (850) 414-3600</p> <p>10</p> <p>11 On behalf of Schering Corporation, Schering-Plough</p> <p>12 Corporation and Warrick Pharmaceuticals</p> <p>13 Corporation:</p> <p>14</p> <p>15 GINGER APPLEBERRY, ESQ.</p> <p>16 Locke Liddell & Sapp PLLC</p> <p>17 2200 Ross Avenue, Suite 2200</p> <p>18 Dallas, Texas 75201</p> <p>19 TELEPHONE: (214) 740-8459</p> <p>20 E-MAIL: Gappleberry@lockeliddell.com</p> <p>21</p> <p>22 (Continued)</p>	<p style="text-align: right;">Page 345</p> <p>1 I-N-D-E-X</p> <p>2 WITNESS: PAGE:</p> <p>3 LARRY REED</p> <p>4 Examination by Mr. Torborg..... 347</p> <p>5</p> <p>6</p> <p>7</p> <p>8 E-X-H-I-B-I-T-S</p> <p>9 NUMBER DESCRIPTION PAGE</p> <p>10 Exhibit Abbott 324-Letter dated August 3, 1994,</p> <p>11 Bates Stamp No. HHD032-0040. 451</p> <p>12 Exhibit Abbott 325-Documentation, Bates Stamp</p> <p>13 Nos. HHD014-0544 through 562 461</p> <p>14 Exhibit Abbott 326-Miscellaneous Documentation,</p> <p>15 (22 pages, no Bates Stamp</p> <p>16 Nos.)..... 498</p> <p>17 Exhibit Abbott 327-Documentation, Bates Stamp</p> <p>18 Nos. HHD014-0657 through 674 516</p> <p>19 Exhibit Abbott 328-Documentation, Bates Stamp</p> <p>20 Nos. HHC004-0188 through 190 532</p> <p>21 Exhibit Abbott 329-Documentation, Bates Stamp</p> <p>22 Nos. HHD014-0764 through 782 580</p>

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<p>1 PROCEEDINGS</p> <p>2</p> <p>3 THE VIDEOGRAPHER: Good morning. This</p> <p>4 is Volume II in the continued video deposition of</p> <p>5 Larry Reed, taken by counsel for Abbott</p> <p>6 Laboratories, In Re: Pharmaceutical Industry</p> <p>7 Average Wholesale Price Litigation, MDL No. 1456.</p> <p>8 We are at Hogan & Hartson at 111 South</p> <p>9 Calvert Street, Baltimore, Maryland. The date is</p> <p>10 Thursday, September 27th, 2007. The time on the</p> <p>11 video screen is 9:15 a.m.</p> <p>12 My name is Ellen Hebert; I am the legal</p> <p>13 video specialist. The court reporter is Dawn</p> <p>14 Jaques. We are employed by Henderson Legal</p> <p>15 Services.</p> <p>16 Counsel who attended yesterday are on</p> <p>17 the record. Will counsel not present yesterday</p> <p>18 please introduce themselves and the parties they</p> <p>19 represent?</p> <p>20 MR. PAUL: Nicholas Paul for California</p> <p>21 Department of Justice for California.</p> <p>22 THE VIDEOGRAPHER: Anyone on the phone</p>	<p>1 videographer. We lost our phone connection.</p> <p>2 Will any parties that did not attend</p> <p>3 yesterday please identify yourselves for the</p> <p>4 record?</p> <p>5 MR. TRENTO: This is Andrea Trento from</p> <p>6 Hogan & Hartson, LLP, representing DMS.</p> <p>7 MS. APPLEBERRY: Ginger Appleberry from</p> <p>8 Locke Liddell & Sapp, representing Sharon</p> <p>9 Corporation, Sharon South Corporation and Merck</p> <p>10 Pharmaceuticals Corporation.</p> <p>11 MR. TORBORG: Would you two --</p> <p>12 MS. HEARD: Eden Heard, Dickstein</p> <p>13 Shapiro, LLP, representing Baxter Health Care</p> <p>14 Corporation.</p> <p>15 MR. TORBORG: Hello, this is the</p> <p>16 problem --</p> <p>17 MR. MILES: Dee Miles, representing --</p> <p>18 THE COURT REPORTER: I'm sorry, you</p> <p>19 need to repeat your name.</p> <p>20 MR. TORBORG: Dee was here yesterday.</p> <p>21 THE COURT REPORTER: Okay, Dee -- okay.</p> <p>22 MR. TORBORG: We just need the people</p>
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<p>1 not present yesterday?</p> <p>2 (No response.)</p> <p>3 THE VIDEOGRAPHER: The witness has been</p> <p>4 sworn in. Please begin.</p> <p>5</p> <p>6 RESUME EXAMINATION BY COUNSEL FOR</p> <p>7 ABBOTT LABORATORIES</p> <p>8 BY MR. TORBORG:</p> <p>9 Q. Welcome back, Mr. Reed --</p> <p>10 A. Thank you.</p> <p>11 Q. -- and good morning.</p> <p>12 A. Good morning.</p> <p>13 Q. Before I continue with my questioning</p> <p>14 with you, I need to figure out what's going on</p> <p>15 with the beeping sound on the phone.</p> <p>16 Let's go off the record, see if we</p> <p>17 can't fix this.</p> <p>18 THE VIDEOGRAPHER: Going off the</p> <p>19 record. The time is 9:16:27.</p> <p>20 (A break was taken.)</p> <p>21 THE VIDEOGRAPHER: Going back on the</p> <p>22 record. The time is 9:18:13. This is the</p>	<p>1 who were not here yesterday to introduce</p> <p>2 themselves.</p> <p>3 MR. MILES: All right.</p> <p>4 MR. TORBORG: No one else needs to do</p> <p>5 it again.</p> <p>6 MR. MILES: All right.</p> <p>7 MR. TORBORG: And those that are new to</p> <p>8 the deposition are asked to fax their name, firm,</p> <p>9 who they represent, their address and their e-</p> <p>10 mail to the following fax number, 410-539-6981 --</p> <p>11 again, that's 410-539-6981 -- and make that</p> <p>12 attention Peter Coolbaugh, C-O-O-L-B-A-U-G-H.</p> <p>13 The court reporter -- that will help</p> <p>14 the court reporter.</p> <p>15 MR. HERNANDEZ: While we're on the</p> <p>16 announcements, yesterday I left open the</p> <p>17 possibility that -- of which states I would be</p> <p>18 here on behalf of, and I went back last night and</p> <p>19 looked at the cross-notices, and what I was able</p> <p>20 to find were cross-notices for Hawaii, Kentucky</p> <p>21 and Wisconsin, so just for the record, I'm here</p> <p>22 on their behalf.</p>

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<p style="text-align: right;">Page 530</p> <p>1 My follow-up question for you, Mr. 2 Reed, was what was HCFA's decision or policy? 3 What was the final decision or policy that HCFA 4 reached? 5 MS. MARTINEZ: Objection to form. 6 THE WITNESS: The decision that -- and 7 I'm not sure, HCFA may too broad of a term here, 8 all of HCFA, but the decision was whether or not 9 to revise regulations for looking at these types 10 of ingredient costs or whether to issue policy 11 instructions for that, and we didn't do -- we did 12 not do either. 13 BY MR. TORBORG: 14 Q. So the decision was not to revise the 15 ingredient cost regulations for -- what was the 16 second? 17 A. A policy guidance document. 18 Q. And what was the rationale for that 19 decision? 20 MR. DRAYCOTT: You can answer, but only 21 limit it to the decision itself. You should not 22 answer to the -- with respect to -- to the extent</p>	<p style="text-align: right;">Page 532</p> <p>1 operate their program and to what extent we 2 intercede in -- in directly making them make 3 changes to the program versus overseeing their 4 program through the state plan process. 5 BY MR. TORBORG: 6 Q. And what about that structure led to 7 your decision not to revise regulations or issue 8 any other policy guidance? 9 A. That there is a structure -- there is a 10 structure in place, again, of how we relate to 11 state Medicaid agencies. There are parts of the 12 prescription drug program where we direct the 13 states how to pay for drugs, or a maximum in 14 aggregate to pay for drugs. There are other 15 parts where the states make their determination 16 of prescription drug payment policies -- of 17 prescription drug payment methodologies. 18 Q. Any other further rationale you can 19 provide? 20 A. No, not at this point. 21 (Deposition Exhibit Abbott 328 was 22 marked for identification.)</p>
<p style="text-align: right;">Page 531</p> <p>1 the answer would reveal the deliberations that 2 resulted in that final decision. 3 MR. TORBORG: I just want to argue with 4 counsel a little bit here before you answer, and 5 that is, the deliberative process privilege does 6 not apply to prevent us from understanding the 7 rationale for the decision. 8 We, I think, all agree on that, and if 9 we don't agree, we can go get some case law, and 10 I think we'll come to a quick agreement. 11 So I am allowed to know what the 12 rationale for the decision was. 13 MR. DRAYCOTT: And he was so instructed 14 just now. 15 MR. TORBORG: Okay. 16 MR. DRAYCOTT: You may state the 17 rationale, but you have to be careful in just 18 stating the rationale that resulted from the 19 deliberations, not the deliberations themselves. 20 THE WITNESS: Okay. The rationale 21 basically is that there's a structure between CMS 22 and the state Medicaid programs on how they</p>	<p style="text-align: right;">Page 533</p> <p>1 BY MR. TORBORG: 2 Q. For the record, Mr. Reed, what I've 3 marked as Exhibit Abbott 328 bears Bates numbers 4 HHC004-0188 through 90. I'd like you to take a 5 look at that document to the extent necessary to 6 tell me whether you recall it. 7 And I'll note, Mr. Reed, that given the 8 file -- some information that counsel has given 9 us about where different documents came from, I 10 have some reason to believe that this document 11 may have come from your files. I don't know for 12 sure, but I have some reason to believe it may 13 have come from your files. 14 Also for the record, this document is 15 titled "Review of Medicaid Drug State Plan 16 Amendments." It's not dated, and there are no 17 particular names on the document. 18 While Mr. Reed's doing that, let me ask 19 counsel for the United States, previous 20 discussions about trying to get a file source 21 index for documents, the government did state if 22 there were particular documents for which we'd</p>

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<p>1 like to know where the documents came, we could 2 request specific documents, and this would be one 3 that I'd like to make that request. 4 MR. DRAYCOTT: By the way, do you have 5 the file source index that we gave you for the -- 6 it appears this one is from the subpoena 7 production that occurred in 2004? 8 MR. TORBORG: Correct. 9 MR. DRAYCOTT: Do you have the file -- 10 I neglected to bring that file source index with 11 us. Do you happen to have that with you? 12 MR. TORBORG: No, but I can tell you 13 that I look at it before this deposition, and Mr. 14 Reed was one of the individuals listed in this 15 Bates -- this Bates range. 16 MR. DRAYCOTT: Well, certainly we note 17 your request, and we'll also perhaps find out 18 more about this document from the witness. 19 BY MR. TORBORG: 20 Q. Mr. Reed, have you had a chance to look 21 at the document? 22 A. I have had a chance.</p>	<p>1 to the provisions of the case management order. 2 We are going to, at this point, recall this 3 document as an inadvertently produced privileged 4 document. 5 Just for the -- so the record is clear, 6 this has been currently marked as Exhibit Abbott 7 328. It bears the Bates number HHC004-0188. It 8 goes through -- it's a three-page document ending 9 HHC004-0190. 10 We'll further confer with CMS prior to 11 the resumption of Mr. Reed's deposition and give 12 you a final decision by the agency as to whether 13 or not it will assert deliberative process 14 privilege over the contents of this document. 15 Therefore, we propose that any questioning of Mr. 16 Reed about the document be deferred to the 17 resumption of his deposition. 18 MR. TORBORG: Anything else? 19 MR. DRAYCOTT: That should do it. 20 MS. MARTINEZ: Let me just add that the 21 recall is also pursuant to the Rules of Federal 22 Civil Procedure as well as the protective order</p>
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<p>1 Q. Okay. And do you recognize this 2 document? 3 A. I'm sorry, I have to talk to counsel 4 about this document. 5 Q. Can you answer the question first, 6 whether -- just the pending question of whether 7 you recognize the document? 8 MR. DRAYCOTT: Do you recognize the 9 document? 10 THE WITNESS: I recognize the document. 11 BY MR. TORBORG: 12 Q. I guess if you're requesting the advice 13 of counsel, I have to let you do that. 14 MR. DRAYCOTT: Why don't we do that. 15 THE VIDEOGRAPHER: Going off the 16 record. The time is 14:54:24. 17 (A break was taken.) 18 THE VIDEOGRAPHER: Going back on the 19 record. The time is 15:06:38. 20 MR. TORBORG: Mr. Draycott, you have 21 some comments on this document? 22 MR. DRAYCOTT: Yeah, this is pursuant</p>	<p>1 in the case. 2 MR. TORBORG: We'll take your recall 3 under advisement. 4 MR. MERKL: Is it -- I have a question, 5 though, insofar as it pertains to the document 6 production issue involving Dey. 7 It's your contention that this was 8 inadvertently produced? 9 MR. DRAYCOTT: Correct. 10 MR. MERKL: Is it on a privilege log? 11 MR. DRAYCOTT: Obviously, it's not. 12 That's -- or it wouldn't have been -- it hasn't 13 been logged, no. 14 MR. MERKL: Although sometimes a 15 document is inadvertently produced, it's logged 16 and -- 17 MR. DRAYCOTT: I understand your 18 question, and, yeah, this is not on a log. 19 MR. MERKL: Okay. I would ask that in 20 the context of your deliberations with HCFA that 21 you undertake an investigation and present to us 22 the basis for the claim of inadvertent</p>

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<p style="text-align: right;">Page 538</p> <p>1 disclosure, because my understanding of the law 2 in that area is that if someone evaluates the 3 document, produces it and then later decides, 4 well, I shouldn't have produced it, looking at it 5 now, I think it really is privileged, that is not 6 -- you're not entitled to get it back. 7 MR. DRAYCOTT: And that's -- again, I 8 can clarify for you that that's not the 9 situation. Indeed, the full nature of the 10 document and the grounds of the privilege were 11 established in part during the conferral we had 12 with the witness outside this deposition room. 13 MR. MERKL: Again, I don't want to 14 argue the merits of it. I am asking that when 15 you do formulate your opinion -- I'm sorry, your 16 position, that you do provide us with the 17 circumstances of how it came to be inadvertently 18 produced so we can fairly evaluate -- 19 MR. DRAYCOTT: Your request is on the 20 record. 21 MR. MERKL: And of course in the 22 interim, we will abide by the court ruling.</p>	<p style="text-align: right;">Page 540</p> <p>1 MR. DRAYCOTT: David, but understand 2 that the decision is not one by the Department of 3 Justice. It's a decision by CMS, and we'll 4 certainly take that issue up with CMS, but it's 5 not simply a matter of the Department of Justice 6 making the decision about whether or not the 7 deliberative process privilege will be asserted 8 with respect to this document. 9 MR. TORBORG: Okay. 10 Mr. Reed, is this a document that you 11 drafted? 12 MR. DRAYCOTT: You may answer that 13 question. 14 THE WITNESS: This was a document that 15 was drafted within our area. 16 BY MR. TORBORG: 17 Q. Okay. Did you review this document? 18 A. Can I answer? 19 MR. DRAYCOTT: You may answer. 20 THE WITNESS: Yes. 21 BY MR. TORBORG: 22 Q. Okay. What harm would result to CMS if</p>
<p style="text-align: right;">Page 539</p> <p>1 MR. TORBORG: A couple housecleaning 2 matters on this before we move on to substantive 3 questioning. 4 The first question would be -- I would 5 ask the Department of Justice to get us an answer 6 within three days on this document, whether 7 you're going to recall it; the reason being is 8 I'm going to attach this document to something 9 I'll file into court and explain this is the type 10 of document that's being withheld from Abbott in 11 defense in this case, which is clearly 12 inconsistent with the allegations you're making 13 in this case. 14 So I'd like a decision within -- I'll 15 file it under seal, but I am going to file this 16 document with the court unless there's some order 17 that prevents me from doing it. So I request a 18 decision within three days about -- your final 19 decision on this document, because what I don't 20 want to get into is a situation where my request 21 is not ripe, something of that nature. I want to 22 know that you've made a final decision.</p>	<p style="text-align: right;">Page 541</p> <p>1 this document was produced to Abbott and other 2 Defendants in average wholesale price litigation, 3 should this be disclosed to us under protective 4 order in this case? 5 Doesn't go outside to the public, just 6 is used in this litigation under protective 7 order. What harm would you feel would come to 8 CMS? 9 MR. DRAYCOTT: Objection, but you may 10 answer. 11 THE WITNESS: This document does reveal 12 our deliberations in looking at state plan 13 amendments. 14 BY MR. TORBORG: 15 Q. And you've done a nice job of 16 paraphrasing the purpose of the deliberative 17 process privilege. My question is a little 18 deeper than that, and that is what precisely 19 would happen that would be detrimental to CMS if 20 this particular document was disclosed to the 21 Defendants in this litigation? 22 MR. DRAYCOTT: Objection. You may</p>

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<p style="text-align: right;">Page 542</p> <p>1 answer.</p> <p>2 THE WITNESS: Until I can look at this</p> <p>3 document in more detail and can look at the other</p> <p>4 records that relate to this document, I'm not</p> <p>5 sure that this is a final document, I'm not sure</p> <p>6 that there's -- that these are the final</p> <p>7 recommendations, I'm not sure that this is the</p> <p>8 final language.</p> <p>9 BY MR. TORBORG:</p> <p>10 Q. And you reviewed this document for</p> <p>11 roughly three minutes when I gave it to you</p> <p>12 before we took a break, correct?</p> <p>13 A. I did look at the document.</p> <p>14 Q. And then you were off the record with</p> <p>15 your counsel for 13 minutes, correct, roughly?</p> <p>16 A. Whatever amount of time that was.</p> <p>17 Q. And can you articulate for me and Judge</p> <p>18 Saris or Judge Bowler what particular harm would</p> <p>19 result if this document were disclosed to Abbott</p> <p>20 and other Defendants under protective order in</p> <p>21 this case?</p> <p>22 MR. DRAYCOTT: Objection. You can</p>	<p style="text-align: right;">Page 544</p> <p>1 MR. DRAYCOTT: Objection. You can</p> <p>2 answer.</p> <p>3 THE WITNESS: HCFA -- I'm sorry, give</p> <p>4 me the question again.</p> <p>5 BY MR. TORBORG:</p> <p>6 Q. HCFA's actions with respect to how it</p> <p>7 approved or disapproved state plans impacted the</p> <p>8 amount that pharmacies were reimbursed for drugs,</p> <p>9 correct?</p> <p>10 A. In some cases, it could impact that</p> <p>11 amount, not necessarily all cases.</p> <p>12 Q. Including the Abbott generic drugs at</p> <p>13 issue in this case, correct?</p> <p>14 MR. DRAYCOTT: Objection.</p> <p>15 THE WITNESS: Again, depending on what</p> <p>16 the state plan amendment -- the amount in the</p> <p>17 state plan amendment and what drugs it affected,</p> <p>18 I don't know.</p> <p>19 BY MR. TORBORG:</p> <p>20 Q. And would you agree with me that -- I</p> <p>21 think is a pretty common sense notion, but it's</p> <p>22 been lost on others, so maybe I'm missing it --</p>
<p style="text-align: right;">Page 543</p> <p>1 answer.</p> <p>2 THE WITNESS: Again, these may not be</p> <p>3 the final recommendations or the final decisions</p> <p>4 made by CMS. I just don't know without being</p> <p>5 able to look at this document and look at the --</p> <p>6 this appears to be a draft of a document that we</p> <p>7 did -- we did do. I'm not sure that this is the</p> <p>8 final -- the final document.</p> <p>9 BY MR. TORBORG:</p> <p>10 Q. Now, this document relates to the topic</p> <p>11 we were discussing previously, which was how you</p> <p>12 used the information contained in OIG reports</p> <p>13 relating to the significant difference between</p> <p>14 AWP and acquisition costs for generic drugs in</p> <p>15 approving state plans, correct?</p> <p>16 A. This is a document that speaks to that</p> <p>17 at a point in time.</p> <p>18 Q. And as we talked brief -- as we</p> <p>19 discussed earlier, HCFA's actions with respect to</p> <p>20 how it approves state plans impacted the amount</p> <p>21 that providers were reimbursed for drugs,</p> <p>22 correct?</p>	<p style="text-align: right;">Page 545</p> <p>1 that the government's policy, whether it be the</p> <p>2 state government or the federal government's</p> <p>3 policies, about how much to reimburse for drugs</p> <p>4 impacts how much the pharmacies are actually paid</p> <p>5 for drugs, correct?</p> <p>6 MR. DRAYCOTT: Objection. You can</p> <p>7 answer if you can.</p> <p>8 THE WITNESS: Okay. The payment</p> <p>9 policies do impact what pharmacies are paid for</p> <p>10 drugs.</p> <p>11 BY MR. TORBORG:</p> <p>12 Q. Including the four families of Abbott</p> <p>13 generic drugs in this case, correct?</p> <p>14 A. Are you talking a specific -- are you</p> <p>15 talking state plan amendment submitted by a state</p> <p>16 at a given time? Are you talking something else?</p> <p>17 Q. Broader. Government policies.</p> <p>18 A. Government policies for payment of</p> <p>19 prescription drugs would affect or could affect</p> <p>20 any manufacturer's drugs, including Abbott's.</p> <p>21 Q. And this is where HCFA was aware that</p> <p>22 the average wholesale prices did not equal what</p>

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<p style="text-align: right;">Page 546</p> <p>1 providers were actually paying for those drugs, 2 correct? 3 MR. DRAYCOTT: Objection. 4 THE WITNESS: And at that point, I 5 think I can't probably confirm or deny that. 6 BY MR. TORBORG: 7 Q. How about you personally, were you 8 aware that average wholesale prices published in 9 the compendia did not equal the amount that 10 providers actually paid for the drugs? 11 A. No, I don't think I have any further 12 comment on that one. 13 Q. Well, we reviewed some OIG reports 14 earlier today that noted a difference between 15 average wholesale price and acquisition costs as 16 found by OIG, correct? 17 A. That for a set of drugs, there was a 18 difference between what the OIG found for that 19 set of drugs and what the state had in its state 20 plan or what we have for reference of what the 21 state plan -- what the state had in its state 22 plan for drugs.</p>	<p style="text-align: right;">Page 548</p> <p>1 later point, when it sees that state plan 2 submission. 3 Q. If we look at Exhibit Abbott 284, this 4 is the copy of the Federal Register, it has the 5 rules for Medicaid reimbursement of drugs after 6 the 1997 federal upper limit legislation, 7 specifically the last page of that exhibit. 8 You'll see a copy or a -- yeah, a copy 9 of the regulations that are Part 447, "Payments 10 for Services." 11 Do you see that, second to last page of 12 Exhibit Abbott 284? 13 A. Yes, I do. 14 Q. Okay. And particularly 447.301 and 15 331, you're familiar with these regulations, are 16 you not? 17 A. I am. 18 Q. Okay. 447.301, "Estimated acquisition 19 is defined as the agency's best estimate of the 20 price generally and currently paid by providers 21 for a drug marketed or sold by a particular 22 manufacturer or labeler in the package size of</p>
<p style="text-align: right;">Page 547</p> <p>1 I think the missing ingredient is the 2 factors -- the decision making process that the 3 state needed to undertake to get from the OIG 4 report to whatever it might want to put in its -- 5 in a state plan submission. 6 Q. Well, what do you mean by missing an 7 ingredient there? I'm not sure I follow. 8 A. One of the first reports said that the 9 state should -- from the OIG, the OIG had 10 recommended the state consider this as a factor 11 in determining changes to its payment rate. 12 So there wasn't a direct connection 13 between the OIG says it should be AWP minus 41.4, 14 whatever the number was, and the state simply 15 saying that's correct, I'll change my plan to AWP 16 minus 41.4. 17 Q. Well, there are other policy 18 considerations at play, correct? 19 A. For the state, that's correct. 20 Q. All right. And for HCFA as well, 21 correct? 22 A. I think for HCFA, or for CMS, at a</p>	<p style="text-align: right;">Page 549</p> <p>1 drug most frequently purchased by providers." 2 Do you see that? 3 A. I do. 4 Q. And then 447.331, "Drugs, aggregate 5 upper limits for payment." If we go -- I'm sure 6 you're familiar with this, but multiple source 7 drugs, there are two categories, those that fall 8 within the federal upper limits, correct, would 9 be the first category? 10 A. I think this makes a reference to how 11 the drugs are categorized, but basically, okay. 12 Q. Okay. And then the second category is 13 all other drugs? 14 A. Other drugs. 15 Q. Right. And then it states, "For other 16 drugs, the agency's payments for brand name drugs 17 certified in accordance with paragraph C of this 18 section and drugs other than multiple source 19 drugs for which a specific limit has been 20 established under Section 447.332 must not exceed 21 in the aggregate payment levels that the agency 22 has determined by applying the lower of the, (1),</p>

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<p style="text-align: right;">Page 550</p> <p>1 estimated acquisition cost, plus a reasonable 2 dispensing fee established by the agency, or, 3 (2), providers' usual and customary charges to 4 the general public." 5 Did I read that right? 6 A. It looks correct. 7 Q. And those are the regulations that HCFA 8 was charged with enforcing in deciding whether to 9 approve or disapprove state plans, correct? 10 MR. DRAYCOTT: Objection. 11 THE WITNESS: These are the regulations 12 that are directed at the states in determining 13 how they would set their payment amounts. 14 BY MR. TORBORG: 15 Q. And it was HCFA's responsibility, was 16 it not, to -- this was the criteria by which HCFA 17 decided whether or not to approve or disapprove 18 state plans for prescription drugs, correct? 19 A. This is a criteria that the states used 20 to determine their payments amounts -- or payment 21 amounts, I'm sorry. 22 Q. What was HCFA's responsibility in this</p>	<p style="text-align: right;">Page 552</p> <p>1 don't believe. 2 BY MR. TORBORG: 3 Q. It's titled "Review of Medicaid Drug 4 State Plan Amendments." First sentence says, 5 "Although there's no statutory provisions for 6 payment rates -- although there are no" -- 7 MS. MARTINEZ: No, we object to you 8 putting the document on the record. 9 MR. TORBORG: You can mark all this 10 confidential. 11 MS. MARTINEZ: No, we -- all we're 12 saying is that we're going to consult with the 13 agency, and then we're going to make a final 14 decision so that you'll have an opportunity to 15 question the witness again if we ultimately don't 16 recall the document. 17 But for you to right now try to put the 18 document on the record, I mean, it totally 19 defeats the recall, so -- I mean, we'd literally 20 have to, you know, excise this out of the 21 deposition for the recall to be effective. 22 All we're asking is for you just to</p>
<p style="text-align: right;">Page 551</p> <p>1 regard, Mr. Reed? 2 A. HCFA's responsibility is to make sure 3 that the states basically do follow these 4 regulations. 5 Q. And you had stated earlier that the 6 decision that you made when deciding what to do 7 about the OIG findings showing a significantly 8 greater discount for generic drugs from AWP 9 versus brand name drugs was whether or not to 10 revise the regulations, one, or, two, issue 11 policy guidance, correct? 12 A. Correct. 13 Q. And the document that the government is 14 attempting to take back from us, Exhibit Abbott 15 328, bears directly on that topic, does it not? 16 MR. DRAYCOTT: Objection. 17 THE WITNESS: Answer? 18 MR. DRAYCOTT: You can answer. 19 THE WITNESS: It involves the same 20 issue. I'm not sure that it bears directly on 21 that topic. That document does not address 22 whether or not we would issue regulations, I</p>	<p style="text-align: right;">Page 553</p> <p>1 defer what you're doing to the third day. That's 2 all. 3 BY MR. TORBORG: 4 Q. Mr. Reed, does this document provide 5 some insight into HCFA's thinking in deciding 6 whether or not to enforce the regulations at 42 7 C.F.R. Section 447.331? 8 MR. DRAYCOTT: Objection. 9 THE WITNESS: Can I hear the last part 10 of the question, repeat it? 11 (The reporter read back the 12 record.) 13 THE WITNESS: It's a decision of how 14 CMS would look at state plan amendments. 15 BY MR. TORBORG: 16 Q. And it references the regulations 17 447.331, correct? 18 A. It references the regulation from 3 -- 19 447.301 through 333. 20 Q. And titled review of state plan 21 amendments, correct? 22 A. "Review of Medicaid Drug State Plan</p>

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<p>1 Amendments."</p> <p>2 Q. So does it not provide some insight</p> <p>3 into HCFA's thinking on whether it should approve</p> <p>4 state plan amendments?</p> <p>5 MR. DRAYCOTT: Objection.</p> <p>6 THE WITNESS: It provides -- answer?</p> <p>7 MR. DRAYCOTT: Well, you can -- again,</p> <p>8 without going into revealing the deliberations,</p> <p>9 the options that were considered, you can state</p> <p>10 what the purpose of the document is.</p> <p>11 THE WITNESS: The purpose of the</p> <p>12 document was to look at ways of how would we</p> <p>13 react to state -- submitted state plan</p> <p>14 amendments.</p> <p>15 BY MR. TORBORG:</p> <p>16 Q. Particularly in the context of the</p> <p>17 OIG's work identifying larger differences in --</p> <p>18 larger differences between average wholesale</p> <p>19 price and average acquisition cost than as</p> <p>20 specified in the state plan amendments, correct?</p> <p>21 A. The OIG reports were a factor in that.</p> <p>22 MR. GORTNER: Eric Gortner for Roxane.</p>	<p>1 amendments that did not provide a reimbursement</p> <p>2 methodology consistent with OIG's findings?</p> <p>3 A. The decision making authority for any</p> <p>4 state plan amendment rests with the Director of</p> <p>5 the Medicaid Bureau -- I'm not going to say that,</p> <p>6 because, at that point, it rests for some time --</p> <p>7 for some time period with the regions and for</p> <p>8 some time period with the Director of the Centers</p> <p>9 for Medicaid & State Operations within CMS.</p> <p>10 Q. When was the -- when did that shift in</p> <p>11 responsibility occur?</p> <p>12 A. The shift occurred I believe in the</p> <p>13 early summer, late spring of 2002.</p> <p>14 Q. What caused that change in</p> <p>15 responsibility?</p> <p>16 A. I think there were some concerns that</p> <p>17 there may be differing interpretations in the</p> <p>18 regions to state plan amendments in this area.</p> <p>19 Q. Are those concerns that you had?</p> <p>20 MR. DRAYCOTT: Objection. To the</p> <p>21 extent -- you can answer, but only to the extent</p> <p>22 that you're not revealing your own participation</p>
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<p>1 I move to strike that answer as non-responsive.</p> <p>2 THE WITNESS: Can I have the question</p> <p>3 again?</p> <p>4 MR. TORBORG: I object to your motion</p> <p>5 to strike because I think he did answer the</p> <p>6 question that I asked, but let's ask it again.</p> <p>7 (The reporter read back the</p> <p>8 record.)</p> <p>9 MR. GORTNER: I stand on my objection.</p> <p>10 BY MR. TORBORG:</p> <p>11 Q. Whose decision was it, Mr. Reed, on</p> <p>12 whether or not to approve or disapprove state</p> <p>13 plan amendments that did not call for a</p> <p>14 reimbursement methodology consistent with OIG's</p> <p>15 findings?</p> <p>16 MR. DRAYCOTT: Objection. You can</p> <p>17 answer if you can.</p> <p>18 THE WITNESS: I can't because I don't</p> <p>19 understand your question. Whose decision was it</p> <p>20 to do what?</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. To approve or disapprove state plan</p>	<p>1 in the deliberations that yielded the final</p> <p>2 policy decision about where authority would</p> <p>3 finally reside.</p> <p>4 THE WITNESS: Then I can't answer.</p> <p>5 (A discussion was held off the</p> <p>6 record.)</p> <p>7 MR. TORBORG: Why would Mr. -- why</p> <p>8 would the fact of whether or not he participated</p> <p>9 in the deliberations be something that would be</p> <p>10 covered by the deliberative process privilege?</p> <p>11 MR. DRAYCOTT: I don't think it's the</p> <p>12 fact of his participation in the deliberations.</p> <p>13 It's -- I think you asked the question -- that</p> <p>14 wasn't the question you asked him is whether or</p> <p>15 not he participated in those deliberations. You</p> <p>16 asked him for his personal view, and if he has a</p> <p>17 personal view that exists outside of those</p> <p>18 deliberations, this goes to the core deliberative</p> <p>19 process.</p> <p>20 Deliberative process covers the</p> <p>21 exchange of opinions amongst agency officials who</p> <p>22 contribute to the final policy decision, so to</p>

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<p style="text-align: right;">Page 558</p> <p>1 the extent that you're asking for his personal 2 view and his personal view is one that was 3 offered during those deliberations, it's 4 privileged. 5 MR. TORBORG: The fact that his 6 personal view was shared with others is the 7 reason why it's privileged? 8 MR. DRAYCOTT: No. That's not your 9 question. Your question was what was his view, 10 and to the extent that he was, at the level that 11 he occupied within HCFA, a part of the 12 deliberations that resulted in the decision where 13 authority to disapprove or approve a state plan 14 resided, that's a deliberation that resulted in 15 that decision. 16 So he can answer except to the extent 17 that it reveals the content of the deliberations, 18 that is, the exchange of ideas amongst the people 19 who were responsible for formulating policy. 20 BY MR. TORBORG: 21 Q. Do you understand his instruction? 22 A. I believe I do.</p>	<p style="text-align: right;">Page 560</p> <p>1 of a different question, but now I've forgotten 2 what that is, too. 3 BY MR. TORBORG: 4 Q. Did you have concerns yourself about 5 whether or not there needed to be a change in who 6 was approving state plan amendments? 7 A. I can't answer that question. 8 Q. Because it would reveal internal 9 deliberations within HCFA? 10 A. That's correct. 11 Q. Your personal view? 12 A. My personal view, if it was part of -- 13 as I understand the instructions, if it was part 14 of the decision making process, yes. 15 Q. The fact that your personal views are 16 involved in the decision making process doesn't 17 automatically cover it -- make them covered by 18 the deliberative process privilege. 19 The deliberative process privilege 20 covers the exchange of ideas, not necessarily 21 your personal view. 22 MR. DRAYCOTT: Objection.</p>
<p style="text-align: right;">Page 559</p> <p>1 Q. Okay. He's directing you not to reveal 2 the exchange of information that occurred during 3 those deliberations. 4 I'm asking you for your personal view 5 of whether or not there needed to be a change in 6 who had the authority for approving or 7 disapproving state plan amendments. 8 MR. DRAYCOTT: Objection. You can -- 9 MR. TORBORG: You've already given him 10 the instruction. I think he answers it. No need 11 for coaching anymore. I think he can answer it. 12 THE WITNESS: Well, I -- 13 MR. DRAYCOTT: Objection. There's been 14 no coaching, Counsel. There's been clear 15 instructions about privilege. 16 MR. TORBORG: Yeah, more than enough, 17 so I think he's got it. 18 THE WITNESS: I think -- I think I 19 heard two questions. One was what was my 20 personal view on this, and in this regard, I 21 think -- I can't answer that question. 22 And then your second question was a bit</p>	<p style="text-align: right;">Page 561</p> <p>1 BY MR. TORBORG: 2 Q. With that clarification, can you answer 3 my question? 4 A. But as I understand it, if my personal 5 opinion were a part of the deliberative process 6 because I expressed that opinion in reaching that 7 decision, it would be covered. 8 Q. And that's your understanding of the 9 deliberative process privilege as conveyed to you 10 by counsel? 11 A. That's correct. 12 MR. TORBORG: And that's a view, Mr. 13 Draycott, that you share? You agree with his 14 understanding; is that right? 15 MR. DRAYCOTT: Counsel, if you have a 16 question that you'd like to direct to the 17 witness, you may. You've already told me that my 18 instruction to the witness was clear and that you 19 didn't want further elaboration, so the 20 instruction stands. 21 David, I mean, we've made our position 22 very clear and our position about this document</p>

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1 very clear. The agency is going to consider this
 2 document and whether or not it's going to persist
 3 in the recall of the document.
 4 MR. TORBORG: Well, I have no doubt
 5 that you'll take back the document because it
 6 doesn't help your case, which seems to be how you
 7 guys are already deciding these issues.
 8 MR. DRAYCOTT: David, again, if you
 9 have a question --
 10 MS. MARTINEZ: Objection, motion to
 11 strike commentary by counsel, not a pending
 12 question. And also an incorrect characterization
 13 of the facts.
 14 BY MR. TORBORG:
 15 Q. Mr. Reed, tell me again, if you would,
 16 in the late spring of 2002, did the decision of
 17 whether to approve a state -- approve or
 18 disapprove a state plan amendment, that shifted
 19 to the Director of CMSO; is that right?
 20 A. That decision shifted to -- disapproval
 21 of state plans was always in central office. It
 22 was always a decision that was not made in the

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1 region, ultimately not made in the region.
 2 The decision to approve state plans did
 3 shift from regional offices to central office
 4 under the authority of the Director of CMSO.
 5 Q. And at that time -- the time that
 6 shifted was in the spring of 2002; is that your
 7 best recollect?
 8 A. As best I recollect.
 9 Q. Okay. And the -- who is the individual
 10 that held that position in the spring of 2002?
 11 Was that Dennis Smith?
 12 A. I believe so. I'm trying to track back
 13 to the dates that Dennis first got there. I
 14 think that's correct. I'm not sure.
 15 Q. Who preceded Mr. Smith?
 16 A. Before that there were some acting
 17 directors.
 18 Q. And did you report directly to Dennis
 19 Smith?
 20 A. For that time period that we were that
 21 team, we did report to the Director of CMSO.
 22 Q. And I apologize to you and to counsel

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1 if I've asked this already and you've already
 2 instructed, but I'm not sure I did.
 3 Why was it that you guys shifted the
 4 responsibility -- what was the rationale for the
 5 decision to change the approval process of state
 6 plan amendments from the regional offices to the
 7 central office? What was the rationale for the
 8 decision?
 9 MR. DRAYCOTT: Objection, asked and
 10 answered, but I'm not going to direct you not to
 11 answer a second time.
 12 THE WITNESS: Again, that the -- that
 13 was based, in part at least, on regional office
 14 review of state plans being somewhat
 15 inconsistent.
 16 BY MR. TORBORG:
 17 Q. Yeah, I did ask that. You did answer
 18 that. Thank you.
 19 The document that's marked Exhibit
 20 Abbott 328 at the bottom contains a signature
 21 line --
 22 MS. MARTINEZ: Objection, Counsel.

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1 You've spent over half an hour -- you've spent
 2 over half an hour questioning the witness on a
 3 document that we have just asked you to recall --
 4 I mean, that we're going to recall and consult
 5 with the witness -- I mean, sorry, with the
 6 agency, and I think you're invading our privilege
 7 or ability to invoke the privilege by continuing
 8 to persist to question on the same document.
 9 So I would just ask, as a matter of
 10 courtesy, for you to just defer your questions.
 11 If, indeed, you're going to be able to do this,
 12 you can do this on the third day, but --
 13 MR. TORBORG: I do take issue with the
 14 statement that I've asked about this document for
 15 a half hour, because I haven't. A lot of the
 16 discussion has not been about this document.
 17 That being said, I'm not going to ask
 18 any more questions about the document, and we're
 19 going to move on.
 20 If I could ask you to go back to the
 21 exhibit that I marked as the Montana state
 22 report, Exhibit Abbott 320 something.

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1078 Reed 30b6 draft.txt

1

DRAFT VERSION

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
3 - - - - -
4 IN RE: PHARMACEUTICAL) MDL NO. 1456
5 INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION
6 PRICE LITIGATION) 01-CV-12257-PBS
7 THIS DOCUMENT RELATES TO)
8 U. S. ex rel. Ven-a-Care of) Judge Patti B. Saris
9 the Florida Keys, Inc.)
10 v.) Chief Magistrate
11 Abbott Laboratories, Inc.,) Judge Marianne B.
12 No. 06-CV-11337-PBS) Bowler
13 - - - - -
14 (captions continue on following pages)

15
16
17 Videotaped deposition of LARRY REED as 30(b)(6)
18 witness for the UNITED STATES OF AMERICA
19
20
21

22 Washington, D. C.

♀

2

DRAFT VERSION

1 Thursday, March 19, 2008
2 9:00 a.m.
3

1078 Reed 30b6 draft.txt

1 Q. And again, are you aware of any data that
2 shows that OIG's findings were incorrect?

3 MS. MARTINEZ: Object to form.

4 A. I don't know what other estimates there
5 might be out there. So at this point I'd have to say
6 I'm not aware of other data. But that's I think as
7 far as I could say that.

8 (Abbott Exhibit 765 was
9 marked for identification.)

10 BY MR. TORBORG:

11 Q. For the record, what I've marked as Abbott
12 Exhibit 765 bears the Bates numbers HHC 004-0131
13 through 37. It appears to be a series of e-mails
14 concerning a South Carolina state plan amendment
15 number 00-009. Mr. Reed, if you would review those to
16 the extent necessary to tell me whether you are
17 familiar with any of these documents and I'll ask some
18 questions.

19 A. (Reading.)

20 Q. I think you'll see that a couple of the
21 e-mails are from you and others are addressed to you.

22 A. (Reading.) I'm sorry. Was there a

♀

DRAFT VERSION

143

1 question?

2 Q. Do you recall any of this correspondence,
3 Mr. Reed?

4 A. I don't recall specifically.

5 Q. The first page of the exhibit, this is an
6 e-mail from Thomas Couch. Do you know who he is?

1078 Reed 30b6 draft.txt
7 A. I believe he worked in the Atlanta regional
8 office.

9 Q. Jessie Spillers is also in that office?

10 A. I believe so.

11 Q. And just to paraphrase, it indicates here
12 that South Carolina had proposed to change its
13 estimated acquisition cost formula from AWP minus 13
14 percent to AWP minus 10 percent, correct?

15 A. From this note, it appears that's what
16 they're proposing.

17 Q. So here they were actually proposing to
18 increase reimbursement on ingredient drugs; is that
19 right?

20 A. That looks to be, again, what they are
21 doing.

22 Q. And if we go to Bates page 133, this is an

♀

DRAFT VERSION

144

1 e-mail from yourself to Cindy Pelter and Jessie
2 Spillers on this particular state plan amendment; is
3 that right?

4 A. The first part; is that correct. Actually,
5 probably the whole thing.

6 Q. And in the portion that you wrote it says
7 "Jessie, the state really needs to prove its case when
8 proposing this change. See 442 C.F.R. 447.301 through
9 333 (especially definition of EAC at point 301) and
10 memo from director of Medicaid bureau to all ARAs
11 dated 8/12/94. Without that documentation I don't
12 think the amendment can be approved." Do you see
13 that?

1078 Reed 30b6 draft.txt

14 A. I do see that.

15 Q. So what are you saying there, Mr. Reed?

16 MS. MARTINEZ: Objection, form.

17 A. It appears here that we're directing
18 that -- and I'll speak on the agency's behalf at this
19 point -- that we're directing the state to go back and
20 review the regulations especially regarding EAC.

21 Q. You believe that they needed to provide
22 some sort of justification to decrease the discount

†

DRAFT VERSION

145

1 off of AWP, correct?

2 A. To decrease the discount?

3 Q. Yes.

4 A. That they needed to prove their case,
5 correct.

6 Q. And you were concerned that AWP minus 10
7 percent that they wanted to go to would not meet the
8 regulatory definition of estimated acquisition cost in
9 particular, correct?

10 A. Well, again, the concern would be that what
11 percentage they wanted to go to would need to meet the
12 definition of EAC.

13 Q. You were concerned that they had not
14 provided evidence to support that, correct?

15 A. And, again, looking at this quickly, I'm
16 not seeing what they submitted that would support
17 that.

18 Q. And that was sort of the point you were
19 making, right?

1078 Reed 30b6 draft.txt
 20 MR. WINGET-HERNANDEZ: Objection, form.

21 A. In this e-mail it appears that I haven't
 22 seen that evidence.

♀
 †

DRAFT VERSION

146

1 Q. And if we go to the next page, Bates page
 2 134, it appears as though Jessie Spillers responded to
 3 your e-mail with the following. She said "Larry, I'm
 4 getting a lot of lack from the state on your response.
 5 The reasons are, one, last year South Carolina SPA
 6 99-08 increased the percentage from 10 percent to 13
 7 percent. Central office Sue Gaston never asked what
 8 type of documentation then that is being asked for
 9 now. Two, it's because under-- underlined --
 10 decreasing the percentage back to 10 percent that the
 11 documentation is needed, three, they were directed by
 12 their legislature to go back to 10 percent. They also
 13 claim that the other states in Region 4 are at 10
 14 percent. So hi the concern from central office with
 15 South Carolina." Do you see that?

16 MS. MARTINEZ: Object to form.

17 A. I do see that.

18 Q. What she's saying there --

19 A. I believe Jessie is a man.

20 Q. What was that?

21 A. Jessie is a man, by the way.

22 Q. Oh, I'm sorry. What Mr. Spillers is saying

♀
 †

DRAFT VERSION

147

1 is that the South Carolina legislature had directed
 Page 116

1078 Reed 30b6 draft.txt

2 them to go back to AWP minus 10, correct?

3 A. Correct.

4 Q. They didn't have any evidence that AWP
5 minus 10 percent was really the best estimate,
6 correct?

7 MS. MARTINEZ: Object it form.

8 A. In must be 3 there I think they're claiming
9 that other states in that region pay at AWP minus 10
10 percent.

11 Q. But that's not empirical evidence, is it?

12 MR. WINGET-HERNANDEZ: Objection, form.

13 MS. MARTINEZ: Objection, form.

14 A. I think when we talked before we did allow
15 the states to look at neighboring states.

16 Q. Well, let's go to the next page, 135. This
17 is your response to Mr. Spillers, correct? You state
18 I can't answer for the past but simply state what the
19 requirements are. My answers follow your questions.
20 In response to his first point, question, you wrote
21 the regulatory requirements are that the state make
22 its best estimate of what the acquisition cost for the

♀

DRAFT VERSION

148

1 drugs are. Why is this the state's best estimate?
2 For example, recent OIG studies have shown the average
3 brand name drug discount to be AWP minus 17 percent
4 and generics AWP minus 42 percent. What is the basis
5 for South Carolina to include AWP minus 10 percent is
6 the proper discount?" ; is that correct? That's what
7 you wrote?

1078 Reed 30b6 draft.txt
8 A. That's a statement in there, that's
9 correct.

10 Q. This is something that you did not course
11 of your duties; is that right?

12 A. Again, I don't have a specific recollection
13 of this e-mail, but that could have been something
14 that I would have written.

15 Q. And here you're referring specifically to
16 OIG's work when questioning whether or not AWP minus
17 10 percent is the best estimate, are you not?

18 A. That's correct.

19 Q. So you asked Mr. Spillers to figure out
20 what is the basis for South Carolina's proposal to go
21 to AWP minus 10 percent, correct?

22 A. That's correct.

♀

DRAFT VERSION

149

1 Q. And in response to number 3 where he had
2 told you they were directed by the legislature to go
3 back to 10 percent, right? Do you remember that? He
4 told you they were directed by the legislature to go
5 back to 10 percent?

6 A. Again, I don't remember it specifically.
7 But I do see it here.

8 Q. And you wrote "I think it would be a
9 difficult case for the state to make that its estimate
10 was based on the legislative directive (although
11 perhaps the directive was based on some estimate the
12 state could use.) Please see the August '94 ARA memo
13 for other things the state might base its estimate
14 on." So what you're telling him there is that the

1078 Reed 30b6 draft.txt

15 legislature saying the rate must be AWP minus 10
16 percent does not necessarily meet the EAC regulation,
17 correct?

18 MS. MARTINEZ: Object to form.

19 A. That that would be a difficult case for the
20 state to make, that's correct. That part is correct.

21 Q. Do you know why the South Carolina
22 legislature directed South Carolina to go back to AWP

♀

DRAFT VERSION

150

1 minus 10 percent?

2 A. No, I don't.

3 Q. Do you recall if the state ever provided
4 you with the additional information that they could
5 base its estimate on to go to AWP minus 10 percent?

6 A. Not in this specific state plan amendment.
7 I don't recall that.

8 Q. If you would go to the Bates page 137, this
9 is a later e-mail on the same state plan amendment; is
10 that right?

11 A. It appears -- that appears to be correct.

12 Q. This is an e-mail from Kimberly Howell that
13 worked in your office?

14 A. That's correct.

15 Q. And she's stating in part, Jessie, we have
16 completed our review of the South Carolina's state
17 plan amendment 00-09, and your request to the state
18 for additional information. We concur with your
19 concerns and the state has not adequately provided
20 documentation to support changing their EAC from AWP

1078 Reed 30b6 draft.txt
21 minus 13 percent to AWP minus 10 percent," correct?

22 A. EACH. I'm not quite sure what that refers

DRAFT VERSION

151

1 to. But the EACH, correct.

2 Q. Do you know in HCFA eventually approved
3 this amendment?

4 A. No. I don't know that.

5 Q. If you would go to Abbott Exhibit 326,
6 specifically if you would start with the year 2000,
7 can you tell us what the South Carolina EAC formula
8 was in the NPC publication for 2000, 2001, 2002, 2003,
9 2004 and 2005?

10 A. In each of those years it's AWP minus 10
11 percent.

12 Q. So does it appear as though HCFA approved
13 the South Carolina SPM amendment 00-009 to go to AWP
14 minus 10 percent?

15 MS. MARTINEZ: Object to form.

16 A. Again, the NPC is a secondary reporting
17 source. But from information in the NPC it looks to
18 be that the amendment was approved.

19 Q. You don't recall taking any action to
20 disapprove federal financial participation for South
21 Carolina, do you, for this issue, in drug payments
22 ever?

DRAFT VERSION

152

1 MS. MARTINEZ: Object to form.

2 A. And I'm not quite sure of your question.
Page 120

1078 Reed 30b6 draft.txt

3 To disapprove the amendment or hold the state plan out
4 of the compliance or --

5 Q. Yes, the second. Hold the state plan out
6 of compliance.

7 A. No. I don't recall that -- any such
8 action.

9 Q. And can you point to any evidence that
10 South Carolina presented to you any data to show that
11 its best estimate was AWP minus 10 percent to rebut
12 the OIG work that you had pointed out to them?

13 MS. MARTINEZ: Object to form.

14 A. Again, I'm going to somewhat rely on the
15 e-mail notes that you showed me. At that time I
16 believe the plans were approved by the regional office
17 was consultation, which does appear to have occurred
18 here, from central office. And I don't have a
19 complete picture. But I don't see other information
20 that the state presented here.

21 (Exhibit 766 was
22 marked for identification.)

♀

DRAFT VERSION

153

1 BY MR. TORBORG:

2 Q. For the record, what I've marked as Abbott
3 Exhibit 766 is a series of documents that I have
4 ordered in chronological order, not necessarily Bates
5 order, that all appear to relate to a particular state
6 plan amendment for the state of Arkansas, number 99-03.
7 The specific Bates numbers though are as follows, HHC
8 010-0868, 861 through 862, 849 through 852, 842 through

1078 Reed 30b6 draft.txt
9 43, 836, 835, 833, 817 through 18, 802 through 07,
10 770, 764, 759, 756 through 57. I marked them in out
11 of Bates order so we could go through them
12 chronologically.

13 Mr. Reed, if I could direct your attention
14 to the first page of the exhibit, under the e-mail at
15 the bottom this is a comment that appears Shirley
16 glee's pee had written. She says we believe the
17 dispensing fee is acceptable based on the results of
18 the survey. However, we question the 10 and a half
19 percent reduction instead of 17.3. Do you see that?

20 A. Yes, I do.

21 Q. And then it says this just increases the
22 margin of profit for the pharmacists; is that right?

♀

DRAFT VERSION

154

1 MS. MARTINEZ: Objection to form.

2 A. That's a statement in here.

3 Q. And then tailor Bruce -- she was with your
4 office, correct?

5 A. For a certain period of time -- I don't
6 remember at this point. She worked in two different
7 offices.

8 Q. She responded in that e-mail to Sue Gaston
9 and Ms. Agrees pee, who I take it was in the Dallas
10 region office?

11 A. That's correct.

12 Q. She wrote "Sue and I just called you and
13 I left a message that we send the final copy of the
14 Arkansas SPA letter, but we were wrong. Larry Reed
15 had to leave early today and has to review this. So

1078 Reed 30b6 draft.txt

16 tomorrow morning we'll get it to you as soon as he's
17 finished reviewing it." Do you see that?

18 A. I do see that part of the e-mail.

19 Q. Why would you have to review that?

20 A. And again, it's a bit of a limited context.

21 But if I'm looking ahead here correctly it looks like

22 the next day I was the person that signed a --

♀

DRAFT VERSION

155

1 Q. Request for additional information?

2 A. Yeah. I want to make sure that's what it

3 is. A request for additional information.

4 Q. And looking at Bates page 867162 --

5 correct -- you signed for someone named Debbie L.

6 Chang; is that correct?

7 A. That's right.

8 Q. Who is that?

9 A. Debbie Chang at that point was the director
10 of a division of benefits coverage and payment, as
11 indicated in the title from paragraph -- part of the
12 letter.

13 Q. Was there another Debbie Chang that worked
14 at CMS that you're aware of?

15 A. Not that I'm aware of.

16 Q. Do you know if this Debbie Chang eventually
17 went to work for the Office of Legislation at CMS?

18 A. No. It was the other way around. She
19 worked for the Office of Legislation before she worked
20 here.

21 Q. But then she eventually worked on issues

1078 Reed 30b6 draft.txt
 22 relating to the state Medicaid program, correct?

♀

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DRAFT VERSION

1 A. I'm sorry. After that time?

2 Q. After she left The Office of Legislation
 3 she worked for the Center for Medicaid and State
 4 Operations, correct?

5 A. That's correct.

6 Q. And that's someone that you would have
 7 reported to; is that right?

8 A. That's correct.

9 Q. I'd like to direct your attention toward
 10 the bottom of the page. Would you have written this
 11 letter, Mr. Reed?

12 A. I don't think I would have directly written
 13 a letter.

14 Q. The second sentence of the paragraph or of
 15 that page, 861, the last paragraph on the page, the
 16 document that you signed states "The survey findings
 17 clearly reflect that the majority of Arkansas
 18 pharmacies report their ingredient costs for drugs to
 19 be 17.3 percent of the mean discounted from AWP and
 20 the larger pharmacies could achieve further discounts.
 21 There is nothing in the survey to support the discount
 22 of the reimbursement formula of AWP minus 10.5 percent

♀

157

DRAFT VERSION

1 as reflected in the SPA.

2 "As such, it appears the state's
 3 reimbursement methodology should reflect the

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4 methodology described in the survey results, i.e., AWP
5 minus 17.3 percent. Please provide documentation to
6 support this. (There is reference in the cover letter
7 that the Arkansas Pharmacists' Association and the
8 state arrived at a mutually acceptable dispensing fee
9 and reimbursement formula. However, the state does
10 not appear to provide adequate documentation for the
11 further reduced reimbursement formula of AWP minus
12 10.5 percent." Do you see that?

13 A. Yes, I do.

14 Q. What you were saying there was Arkansas
15 provided data to HCFA showing that the real -- that
16 the average discount was 17.3 percent, but the state
17 plan called for a discount of only 10.5 percent from
18 AWP, correct?

19 MS. MARTINEZ: Objection, form.

20 A. There are survey findings here. I'm not
21 sure where the survey findings come from. But the
22 percentages appear to be correct.

♀

DRAFT VERSION

158

1 Q. And you were informed here that Arkansas
2 had agreed upon the 10.5 percent formula based upon
3 discussions with the Arkansas Pharmacist Association,
4 correct?

5 MR. WINGET-HERNANDEZ: Objection, form.

6 A. That appears to have been in the state's
7 cover letter with the submission of the SPA.

8 Q. Was that a common occurrence, Mr. Reed,
9 that the AWP rates were set based upon negotiations

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10 with pharmacist associations and not on survey
11 results?

12 MR. WINGET-HERNANDEZ: Objection, form.

13 MS. MARTINEZ: Objection, form.

14 A. I don't know to what extent the states
15 might have discussed or negotiated those types of
16 discounts. I just don't know.

17 Q. Here you were advised of that, correct?

18 A. That -- again, apparently, according to the
19 cover letter that they did arrive at this mutually
20 acceptable dispensing fee and reimbursement formula.

21 Q. Identify only have I think a minute left on
22 the tape, so why don't we take a break and I'll

♀

DRAFT VERSION

159

1 continue on.

2 THE VIDEOGRAPHER: This is the end of tape

3 3. Off the record at 2:34.

4 (Recess.)

5 THE VIDEOGRAPHER: This is the beginning of
6 tape 4 in the 30(b)(6) of the United States of America
7 by Mr. Reed on the record at 2:51.

8 BY MR. TORBORG:

9 Q. Mr. Reed, the document ending at Bates 849
10 to 852 appears to be the Arkansas response to HCFA's
11 request for additional information. Does that appear
12 to be correct?

13 A. That does appear to be correct.

14 Q. If you would go to the Bates page ending
15 850, the last paragraph states "The acquisition cost
16 survey performed by Myers & Stauffer determined that

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17 the average acquisition cost of brand name drugs is
18 AWP minus 17.3 percent. To reiterate this was an
19 average. There were many brand name drug products
20 sampled which had average acquisitions costs in the
21 range of AWP minus 11 to 16 percent. Setting the
22 reimbursement level at AWP minus 10.5 ensures adequate

†

DRAFT VERSION

160

1 reimbursement for a broad range of products." Do you
2 see that?

3 A. I do see that part of the response.

4 Q. Did that response satisfy the concerns HCFA
5 had raised on whether AWP minus 10.5 percent was
6 Arkansas' best estimate?

7 MS. MARTINEZ: Object to form.

8 A. I don't know without looking further to
9 record here, if that's in this record.

10 Q. Why don't I ask you to go to Bates page
11 ending 842. This is a response from the HCFA branch
12 office to the central office, in particular,
13 Ms. Chang; is that right relating to this?

14 A. That appears to be correct.

15 Q. If you would review the second paragraph of
16 that to yourself? Actually, I'll just go ahead and
17 read it in. It says "Based upon our review, we still
18 do not believe the state has adequately addressed our
19 concern relating to the additional profit that was
20 added to the dispensing fee. On page 3 of the survey
21 report by Myers & Stauffer the statement is made that
22 rebate amounts are not captured on the wholesaler

†

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DRAFT VERSION

1 invoices, nor are they reflected as offsets to the
2 costs in the dispensing survey.
3 "In addition, large discounts are shown on
4 page 5 under the heading estimated acquisition cost
5 findings which add an additional margin of profit. In
6 a telephone conversation with the consultants we were
7 told that the savings are actually greater than 17.3
8 percent, which is only an average. Therefore, we
9 question why there would be a need to add more profit
10 onto the dispensing fee." Do you see that?

11 MS. MARTINEZ: Object to form.

12 A. I do see that part of the letter.

13 Q. The regional office did not believe it was
14 appropriate to have profit in the distribution fee
15 because there was already profit in the ingredient
16 cost side of the equation that's correct?

17 MS. MARTINEZ: Object to form.

18 A. I'm not quite sure if they're talking about
19 them together or separately, but -- so I'm not sure.

20 Q. Well, isn't it true that the regional
21 office is saying there's already a profit in the
22 ingredient side? Correct?

♀

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DRAFT VERSION

1 A. The first sentence is talking about dim
2 profit that was added to the distribution fee. And
3 then they go on on page 3 to talk about -- I'm sorry.
4 They go on later this that same paragraph to reference
Page 128

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5 page 3 and talk about the survey. But that appears to
6 be a dispensing survey.

7 Q. And they talk about 17.3 percent, correct?
8 Then they say therefore we question why there would be
9 a need to add more profit onto the distribution fee.
10 Do you see that?

11 MS. MARTINEZ: Object to form.

12 A. I do see those sentences.

13 Q. Aren't they saying there that because
14 there's already profit on the ingredient part side,
15 there's no need to put profit on the distribution fee
16 side?

17 MS. MARTINEZ: Object to form.

18 A. Again, I can only tell you what I see in
19 the letter. "Therefore, we question whether you need
20 to add more profit onto dispensing fee." I'm not sure
21 what they're referring to as more profit here.

22 Q. Isn't it true that on many occasions HCFA

⌘

DRAFT VERSION

163

1 took issue with allowing an increase in distribution
2 fees because there was already profit built into the
3 payment for drug ingredients?

4 MS. MARTINEZ: Objection, form.

5 MR. AZORSKY: Objection, form.

6 A. I don't have any information on that.

7 Q. Certainly that appears to be what's
8 happening here; is that not right?

9 MR. AZORSKY: Objection, form.

10 A. .

1078 Reed 30b6 draft.txt
 11 A. And again, from this letter I simply can't
 12 tell. I can't tell it if they're objecting to
 13 additional profit on the I'm not saying one way or the
 14 other. I can't tell.

15 Q. Go to Bates page 35 And 33. It appears to
 16 be some notes of a conference call between the central
 17 office of HCFA and the Arkansas Medicaid agency,
 18 correct, including yourself?

19 MR. WINGET-HERNANDEZ: Could you give us
 20 those numbers again?

21 MR. TORBORG: 35 and 33.

22 A. And I'm sorry. Who did you say that was?

♀

DRAFT VERSION

164

1 Representing what? What agencies?

2 Q. The central office of CMSO and people from
 3 the Arkansas Medicaid agency.

4 A. No. I don't believe that's correct.

5 Q. Okay. What am I getting wrong?

6 A. I believe it's members of CMS central
 7 office and CMS or at that point HCFA regional office.
 8 I don't think -- if I'm looking at the participants
 9 listed here I don't believe any are state Medicaid
 10 agency individuals, although I'm not quite sure on the
 11 first page about Margaret Cano.

12 Q. In any event, it appears you attended this
 13 conference call relating to this particular state plan
 14 amendment we've been discussing; is that right?

15 A. From the context it does appear to be the
 16 case.

17 Q. If we go to 33. That's where you are,
 Page 130

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18 first paragraph, about halfway down, the sentence
 19 starts with "The calculation? Do you see that? It
 20 states the calculation of a dispensing fee should
 21 already incorporate all activities related to the
 22 dispensing of the drug and an additional profit should

♀

DRAFT VERSION

165

1 not be added to the distribution fee. Do you see
 2 that.

3 A. I do see that.

4 Q. Do you have an understanding of what that
 5 means?

6 A. Yes. I believe I do.

7 Q. Can you tell us what it means?

8 A. That in the calculation of a dispensing fee
 9 a method of payment for a state Medicaid program would
 10 be the fee would equal the cost of of in this case
 11 dispensing the drug and those costs by definition
 12 would have profit built into them.

13 Q. The next sentence of this document states
 14 "In addition there is nothing in the way to support
 15 the discount off of the reimbursement formula of AWP
 16 minus 10.5 percent as reflected in the state plan
 17 amendment." Correct?

18 A. That is correct, that that's the statement
 19 here.

20 Q. If you would go to the Bates page 802
 21 through 807 does this appear to be another letter from
 22 Arkansas Department of Human Services responding to

♀

166

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DRAFT VERSION

1 issues concerning that particular state plan
2 amendment?

3 A. This does appear to be a subsequent letter
4 to the -- I think they indicate January 4th. It looks
5 like our letter was June 4th. Anyway, this does look
6 like a separate response to the request for additional
7 information.

8 Q. If you go to Bates page 805 under the
9 section ingredient cost, it appears HCFA had asked
10 "Does the survey find that the 17.3 percent discount
11 from AWP to be the best estimate of what pharmacies
12 are generally and currently paying for drugs in
13 Arkansas. If not what does the survey show." Do you
14 see that?

15 A. I do see that statement, that sentence.

16 Q. And the response indicates that this is
17 what Myers & Stauffer had found for brand name drugs,
18 correct?

19 A. The second sentence does say that this is a
20 mean discount for brand name drugs.

21 Q. Go to Bates page 764. Does this appear to
22 be an approval of the Arkansas State plan amendment

♀

DRAFT VERSION

167

1 99-033? Or 003. Sorry.

2 MS. MARTINEZ: I am having trouble finding
3 it. I found it.

4 A. I'm sorry. What was your question again?

5 Q. Does this appear to be a HCFA approval
Page 132

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6 Letter of Arkansas State plan amendment 99-003?

7 A. No.

8 Q. Okay. Can you tell us what it is?

9 A. That appears to be a letter from the
10 division of benefits, coverage and payments, the
11 central office, to the regional office, which would
12 not be the approval letter to the state.

13 Q. But it shows the central office approved
14 the plan, correct?

15 MS. MARTINEZ: Objection, form.

16 Q. It was telling the regional office that?

17 A. Let's see. Let me read the letter a little
18 bit. (Reading.)

19 It appears to be a letter from the central
20 office to the regional office saying that the central
21 office is okay with approving the plan.

22 Q. And this was the state plan amendment that

♀

DRAFT VERSION

168

1 set the reimbursement formula at AWP minus 10.5
2 percent, correct?

3 MS. MARTINEZ: Objection, form.

4 A. The letter makes reference to a dispensing
5 fee. But the state plan numbers, though, are the
6 same.

7 Q. If we go back to Bates page earlier in the
8 exhibit toward the beginning, maybe the fourth page
9 in, 850, under paragraph 3, ingredient cost, toward
10 the bottom, the first paragraph, does it refer to
11 reimbursement formula of AWP minus 10.5 percent?

12 1078 Reed 30b6 draft.txt
Strike that. Let's speed this up.

13 A. Okay.

14 Q. If we go to the NPC reports, Abbott Exhibit
15 326, specifically for the years 2000, 2001, 2002, take
16 a look at that. Does it appear as though Arkansas had
17 an EAC formula of 10.5 percent? Are you telling me
18 that this state plan amendment was effective for that
19 period? State plan amendments have different
20 effective dates on them.

21 Q. Does it appear, Mr. Reed, that HCFA
22 approved a state plan amendment for Arkansas that set

♀

DRAFT VERSION

169

1 reimbursement at AWP minus 10.5 percent?

2 MS. MARTINEZ: Objection, form.

3 A. Again, I see NPC data that indicates AWP
4 minus 10.5 percent. I see a letter from the central
5 office of CMS to the regional office. I don't see the
6 actual approval letter, so I'm not certain.

7 Q. You had raised concerns -- the central
8 office had raised concerns and you had raised concern
9 in your initial request for additional information for
10 why 10.5 percent was the best estimate, correct?

11 A. In our request for additional information?

12 Q. Yes.

13 A. That's correct.

14 Q. And did you -- and they indicated to you
15 that Myers & Stauffer had prepared a report that
16 showed for branded drugs AWP minus 17.3 percent was a
17 result of the survey, correct?

18 A. It's a bit confusing because I think they

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19 have two responses to the request for additional
20 information. So which one are you referring to?

21 Q. The initial one. July 20th. Bates page
22 849 through 852.

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DRAFT VERSION

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1 A. In that one they did. But I suspect
2 because there's two responses here, probably the
3 earlier one was withdrawn.

4 Q. Did Idaho provide you any data showing that
5 AWP minus 10 percent was their best estimate?

6 MS. MARTINEZ: I think you didn't mean to
7 say Idaho.

8 MR. TORBORG: I'm sorry. I didn't.

9 MS. MARTINEZ: Okay.

10 BY MR. TORBORG:

11 Q. Arkansas provided data?

12 A. I was hoping it would be a simple question.

13 What I see in here was that there were
14 additional conversations. I don't see what the
15 results of those conversations were, so I don't know
16 if there were additional data beyond the response to
17 the request for additional information. And I
18 don't -- unless a second request for additional
19 information has more information from the first, I
20 just -- I can't tell. I don't know.

21 Q. As you sit here today you can't point to
22 any data that Arkansas provided to you showing that

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DRAFT VERSION

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1 its best estimate was AWP minus 10.5; is that correct?

2 MS. MARTINEZ: Objection, form.

3 A. You see anything here in the information
4 that you've presented.

5 (Abbott Exhibit 767 was
6 marked for identification.)

7 BY MR. TORBORG:

8 Q. Mr. Reed, what I've marked as Abbott
9 Exhibit 767 has the Bates numbers HHC 020-1589 through
10 90. It appears to be a transmittal of an Idaho
11 Medicaid state plan from the department of health and
12 welfare, state of Idaho, to Robert Reed, who appears
13 to work in the regional office in Seattle; is that
14 right?

15 A. He did work there at that time, correct.

16 Q. And then the plan for prescribed drugs in
17 the second page under estimated acquisition cost says
18 as follows: "Estimated acquisition cost as
19 established by the department following negotiations
20 with representatives of the Idaho pharmacy profession
21 defined as an approximation of the net cost of the
22 drug and a reasonable operating margin, plus the

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DRAFT VERSION

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1 assigned dispensing fee," do you see that?

2 A. I see that section.

3 Q. I bet you didn't like that one.

4 MS. MARTINEZ: Object to form.

5 Q. Do you recall, Mr. Reed, Idaho submitting a
6 state plan that sought to define estimated acquisition

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7 cost in that way?

8 A. No. I don't recall this one.

9 Q. Do you believe that a state plan that
10 sought to provide a reasonable operating margin would
11 be in compliance with federal regulations?

12 MR. WINGET-HERNANDEZ: Objection, form.

13 A. I think probably the agency's view would be
14 that this would be better defined in EAC. It would be
15 easier to judge within that context than what's
16 written here.

17 (Abbott Exhibit 768 was
18 marked for identification.)

19 BY MR. TORBORG:

20 Q. For the record, what I've marked as Abbott
21 Exhibit 868 bears the Bates numbers HHC 020-1569
22 through 70. It appears to be a May 6th 1999

♀

DRAFT VERSION

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1 memorandum that was signed by you on behalf of Debbie
2 Chang to the associate regional administrator in
3 Seattle concerning the same Idaho state plan amendment
4 that was the subject of Abbott Exhibit 767; is that
5 right?

6 A. I don't see an identification number on
7 767. I don't see a state plan amendment number.

8 Q. Fair enough. If you would go to the second
9 page, under item 2C? The second paragraph states "The
10 state should remove 'a reasonable operating margin'
11 from the EAC reimbursement methodology. The
12 dispensing fee allows for reasonable operating

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13 margin." Do you see that?

14 A. I see that, those statements.

15 Q. And that's referencing the same language
16 that we saw in Abbott Exhibit 767, correct?

17 A. They both use the same words, that's
18 correct.

19 Q. Does this refresh your recollection at all
20 regarding this particular state plan amendment?

21 A. No, it does not.

22 (Abbott Exhibit 769 was

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1 marked for identification.)

2 BY MR. TORBORG:

3 Q. For the record, what I've marked as Abbott
4 Exhibit 769 bears the Bates numbers HHC 009-1316
5 through 35. It appears to be a collection of
6 documents relating to an Illinois state plan amendment
7 concerning the reimbursement rate for drugs for the
8 time period of 2001.

9 Mr. Reed, I'd like to draw your attention
10 first to the page number 1318. Does this appear to be
11 a document that provides a red line showing the
12 changes that Illinois was proposing to their payment
13 methodology for drugs?

14 MR. AZORSKY: Objection to form.

15 A. This does.

16 Q. It appears for single source drugs Illinois
17 was proposing a change from AWP minus 10 plus a
18 distribution fee or WAC plus eight plus a distribution
19 fee to AWP minus 11; is that right?

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20 MR. WINGET-HERNANDEZ: Objection to form.

21 Q. 11 percent?

22 A. 11 percent. That's correct.

♀

DRAFT VERSION

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1 Q. And then they were changing the payment
2 methodology for multiple-source drugs from AWP minus
3 12 percent to AWP minus 20 percent; is that right?

4 A. That appears to be what's on the page,
5 that's correct.

6 Q. And you knew by that time, Mr. Reed, of
7 discounts from AWP for generic drugs of much greater
8 than 20 percent; is that right?

9 MS. MARTINEZ: Object to form.

10 A. The OIG had reported discounts. I'm not
11 sure if they looked at Illinois specifically. But for
12 some states that had reported discounts for generic
13 drugs that were higher than 20 percent.

14 Q. If you would go to Bates page 335. That
15 includes an e-mail from Cindy Pelter in your office,
16 right?

17 A. At that point in time, that's correct.

18 Q. To a Vera Drivalas? Do you know who that
19 is? D-r-i-v-a-l-a-s?

20 A. She was either an analyst or a state rep in
21 the Chicago regional office.

22 Q. And to summarize, she was asking for

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1 Illinois to provide documentation to support the
2 changes they had made to the reimbursement
3 methodology. And she finished her paragraph by
4 stating "I guess it's better to just go ahead and ask
5 for it now since I know that Larry's going to ask me
6 to get it anyway." Right?

7 MS. MARTINEZ: Objection, form.

8 A. That is the statement in the e-mail.

9 Q. If we go to page 1324, this is an e-mail
10 from John Claborn, C-l-a-b-o-r-n, to yourself, Ms.
11 Gaston and Ms. Drivalas; is that right?

12 A. It appears to be.

13 Q. Concerning the Illinois state plan
14 amendment 01-15, correct?

15 A. Correct.

16 Q. She says in her second paragraph, our drug
17 cost methodology was redrived via a two-step approach
18 which required, one, a thorough review when in what
19 other states were doing in selecting a percentage
20 offer of AWP that was reasonable, and two, conducting
21 negotiations with the pharmacy industry." Do you see
22 that?

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1 A. I see that paragraph.

2 Q. Any reason to believe that this was
3 incorrect?

4 MS. MARTINEZ: Objection, form.

5 A. I'm sorry. That it's not an e-mail? That
6 it's not correct information?

7 Q. Any not correct information that she had
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8 provided to you?

9 MS. MARTINEZ: Objection, form.

10 A. I just don't have a basis to judge. I have
11 no recollection either way.

12 Q. And how do negotiations with the pharmacy
13 industry establish a state's best estimate of what
14 providers were currently and generally paying for
15 drugs?

16 MS. MARTINEZ: Objection, form.

17 A. As part of any state plan amendment, for a
18 reimbursement change, the state is required to give
19 public notice of that change and on occasion will have
20 public hearings for that, regardless if they publish
21 public news they may well receive comments or even
22 requests for a meeting with a state.

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1 So it wouldn't be atypical, or I guess it
2 could occur that a state would basically discuss the
3 change with the pharmacies or the pharmacy
4 organization or whoever would be affected in that
5 state.

6 Q. And it could be that the EAC rate selected
7 by a state was not calculated based upon any survey of
8 actual acquisition costs, but instead was created
9 based upon negotiations with the pharmacy industry; is
10 that right?

11 MS. MARTINEZ: Objection, form.

12 A. I'm sorry. The first part of your question
13 was it could be that?

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14 Q. The EAC rates selected by the state was not
 15 calculated based upon any survey of actual acquisition
 16 costs, but instead was created based upon negotiations
 17 with the pharmacy industry.

18 A. The best estimate could be based on a
 19 number of factors. Again, it didn't need to
 20 necessarily be based on a survey. It could a number
 21 of different factors.

22 Q. Would negotiations with the pharmacy

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1 industry be one of those factors that would be
 2 appropriate under the federal regulations?

3 A. I don't think that we address that one way
 4 or the other. I don't think in federal regulations or
 5 in follow-up policy.

6 Q. Well, if you knew -- if you had evidence,
 7 Mr. Reed, that -- or all the evidence you had pointed
 8 to the actual acquisition costs on average being, for
 9 generic drugs, AWP minus 60 percent, and a state
 10 wanted to use a formula that discounted AWP minus 20
 11 percent, would that be appropriate under federal
 12 regulations?

13 A. Again, depending on the documentation a
 14 state submitted, it might be.

15 Q. What would that documentation have to
 16 include for that to be in accordance with federal
 17 regulations?

18 A. There is no prescribed information it needs
 19 to include. We would react to whatever they
 20 submitted.

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21 Q. Would they need to include empirical
22 evidence?

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1 A. That could include that.

2 Q. Would a negotiated rate set with pharmacy
3 providers be in itself an acceptable methodology under
4 federal regulations?

5 MS. MARTINEZ: Objection, form.

6 A. To answer your question I think we would
7 need to see what rate was negotiated and under what
8 terms in that state. I don't think I would rule it
9 out categorically. I'm not sure that I would say it's
10 okay categorically either.

11 Q. So it might be perfectly appropriate to
12 have that be the rate?

13 A. Again, I think that would be --

14 MR. AZORSKY: Objection, form.

15 A. That would be based on individual -- that
16 would be based on this individual state plan and the
17 circumstances in that state plan.

18 Q. So it could be, correct?

19 A. I think I've probably gone as far as I can
20 go on that. I just don't know. You would have to see
21 specifics. This would be a specifics-driven
22 determination.

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1 Q. But it could be, yes or no?

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2 MR. AZORSKY: Objection to form.

3 A. Again, depending on what that negotiation
4 entailed and what information would be in conjunction
5 with that. Here there is other information. But I
6 don't know.

7 Q. Bates page 1316, Mr. Reed, the first page
8 of the exhibit, is that the approval letter from HCFA
9 to the State of Illinois for state plan amendment
10 01-015?

11 A. This looks to be an internal copy of the
12 approval letter.

13 Q. So if HCFA approved the plan the
14 reimbursement rate in this instance that it knew was
15 negotiated with representatives of the pharmacy
16 community; is that right?

17 MS. MARTINEZ: Objection, form.

18 A. I'd want to go back and look at this again.
19 But I believe that there was other factors here as
20 well.

21 Q. But one of the factors was -- or one of the
22 drivers of the methodology was negotiations with the

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DRAFT VERSION

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1 pharmacy industry, correct?

2 MS. MARTINEZ: Objection, form.

3 A. Yeah. It looks like in part with -- and
4 again, I'm reading from the note object page you
5 referenced before, 1324, what other states are doing
6 and in part conducting -- both in part and conducting
7 negotiations with the pharmacy industry."

8 Q. If I could ask you to take out Abbott
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9 Exhibit 455.

10 A. I'm sorry. The exhibit?

11 Q. 455. This is a copy of the the cover

12 letter and report for a September 21 OIG report titled

13 "Medicaid's use of revised average wholesale prices."

14 Do you recall this report, Mr. Reed?

15 A. No. Not offhand.

16 Q. Go to the Bates page ending 1284 can you

17 tell me what this page reflects? You may want to look

18 to the page before it as well.

19 A. The page itself is an internal control

20 sheet for correspondence.

21 Q. It says "record of sign-offs." What does

22 that mean? Does it have reference to comments that

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1 CMS provided to this report?

2 A. I'm sorry. Are you saying does this

3 control sheet have that?

4 Q. Yes.

5 A. If it does, I'm missing it.

6 Q. What does a sign-off mean?

7 A. In general, for a control sheet it would

8 indicate that the analyst and the persons on the upper

9 line would have signed off on a particular document

10 before its signature or other release.

11 Q. It appears as though this particular

12 sign-off is providing a sign-off or relates to the

13 comments that CMSO had to this particular OIG report?

14 A. I just don't see that.

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15 Q. Is that -- page 1284, is that your name
16 under "cleared by," Reed, the second one down?

17 A. Yes.

18 Q. And the page before this document concerns
19 commenting upon the OIG report "Medicaid's use of
20 revised average wholesale prices"? Do you see that?

21 A. Yes, I do.

22 Q. If you go two pages before that, does that

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1 appear to be CMS's written comments to this particular
2 OIG report?

3 A. Yes, it does.

4 Q. Do you recall this particular comment, Mr.
5 Reed?

6 A. No, I don't.

7 Q. Do you recall when the last time was that
8 you looked at this comment?

9 A. That I looked at this comment?

10 Q. Yeah. You would have reviewed the comments
11 that CMSO had to OIG reports, correct?

12 MS. MARTINEZ: Objection, form.

13 Q. That was part of your job?

14 A. For reports on Medicaid pharmacy, I would
15 have have probably looked at the report or reviewed
16 the report, that's correct. Or signed off on the
17 report.

18 Q. And as we've seen today and in prior
19 depositions, you're a fairly precise person. Is that
20 fair to say?

21 MR. AZORSKY: Objection, form.
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22 MS. MARTINEZ: I guess you're talking about

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1 Mr. Reed, not CMS?

2 MR. TORBORG: Yes, I am.

3 A. Okay. As an individual, I hope so.

4 Q. So when you review a comment to an OIG
5 report you make sure that it's correct; is that right?

6 MS. MARTINEZ: Objection, form.

7 A. Again, to the best of my abilities.

8 Q. Look at the second page of the comment. It
9 states there "The OIG concludes that because most
10 states base their reimbursement for drugs on AWP's,
11 inflated AWP's have 'caused Medicaid to overpay for
12 these products' (see pages ii (conclusion) and 9
13 (first paragraph.)) Since the regulations and
14 relevant state plans authorize payment for drugs based
15 on AWP's, regardless of whether those prices are
16 inflated, we have concerns with the statement that
17 states and Medicaid have 'overpaid' for drugs. We
18 therefore recommend that the sentences on pages ii
19 (penultimate paragraph, second sentence) and 9 (first
20 paragraph, second sentence) be deleted."

21 Do you recall that language, Mr. Reed, now
22 that I've read it?

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1 A. No, I don't.

2 Q. Do you have an understanding of -- as you

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3 sit here today, do you have an understanding of what's
4 being conveyed there?

5 A. I think CMS's position here was that there
6 was a -- that the regulations and state plans did rely
7 on AWP's. So to some extent to call these overpayments
8 based on what were in existing state plans might be
9 considered by CMS to be a misnomer.

10 Q. And it says "even if these AWP's are
11 inflated," correct?

12 A. I'm sorry. I'm in the seeing where you're
13 reading from.

14 Q. It says since the regulations in relevant
15 state plans authorize payments for drugs based on
16 AWP's, regardless of whether those prices are inflated,
17 we have concerns with the statement that the state and
18 Medicaid have 'overpaid' for drugs." Do you see that?

19 A. I do see that.

20 Q. So what CMS is saying here is even though
21 the AWP's might be higher than acquisition costs,
22 because state plans and federal regulations allow that

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DRAFT VERSION

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1 it's improper to say that Medicaid has overpaid for
2 drugs, correct?

3 MS. MARTINEZ: Objection, form.

4 A. Again, I'm only skim reading pretty much
5 along with you. But it appears to be that the OIG's
6 problem -- or that OIG's concern, if you will, isn't
7 necessarily overpayments but the use of AWP. And
8 CMS's response is AWP, even if you consider it to be
9 inflated, still is used by the agencies. Those

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10 agencies may discount that AWP. And the simple use of
11 AWP doesn't necessarily mean that Medicaid has
12 overpaid for those drugs.

13 Q. Mr. Reed, do you recall discussions within
14 CMS about the topic of whether or not payments based
15 upon inflated AWP's were resulting in overpayments?

16 A. I think certainly there were interests in
17 looking at AWP's to look at how -- what they
18 represented, what they continued to represent. And
19 again, just as something that we learned more about
20 over time, and even ultimately what other measures we
21 might choose. And I think kind of the result of that
22 concern is eventually the use of AMP's in the Deficit

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1 Reduction Act, for example, for the FUL's program and
2 for those to be made publicly available.

3 Q. Is there any other interpretation on this
4 language here that you'd like to provide?

5 A. And again, I'm reading this quickly as
6 you're presenting it to me. I'm not saying that there
7 isn't another interpretation. That's how I would look
8 at it at this point.

9 (Abbott Exhibits 770 through
10 775 were marked for
11 identification.)

12 BY MR. TORBORG:

13 Q. Okay. Just a little housekeeping to make
14 sure we're all on the same page and for the record.
15 What I've marked as Exhibit 770 bears the Bates

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 16 numbers HHC 009-1130. And what I've marked as Abbott
 17 Exhibit 771 bears the Bates numbers HHC 009-1124
 18 through 25. What I've marked as HHC 009-1117 through
 19 19, that's 772. What I've marked as Abbott Exhibit
 20 773 bears the Bates numbers HHC 009-1084 through 88.
 21 What I've marked as Abbott Exhibit 774 bears the Bates
 22 numbers HHC 009-0978. And finally what I've marked as

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1 Abbott Exhibit 775 bears the Bates number HHC
 2 009-0970.
 3 Mr. Reed, I believe all of these documents
 4 you see related to a contemplated amendment in 2001
 5 01-009. Does that appear to be the case, Mr. Reed?
 6 A. From a quick review that appears to be the
 7 case.
 8 Q. The first one is a letter from yourself to
 9 the associate regional administrator in Chicago that
 10 indicates that you agree with concerns that the State
 11 of Wisconsin has not adequately provided documentation
 12 to support the reimbursement methodology of EAC --
 13 or --I'm sorry -- the reimbursement methodology of
 14 estimated acquisition cost representing AWP minus
 15 11.25 percent. Is that right?
 16 A. That's the statement in the first part of
 17 the letter. That's correct.
 18 Q. And then if we look at 771, this is an
 19 e-mail -- a couple e-mails starting from the bottom
 20 11/01 is the e-mail from Pamela Carson. She was in
 21 the regional office in Dallas; is that right?
 22 A. Pam Carson is in the regional office in

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1 Chicago, I believe.

2 Q. And her first point that she made in the
3 e-mail was the state needs to provide the data used in
4 the decision to determine that the change is -- I
5 think she meant in -- but is reimbursement is their
6 best estimate." Do you see that?

7 A. I see that statement. That's correct.

8 Q. And then in response there's an e-mail from
9 it appears a Rita Hallett. Do you know who that is?

10 A. No, I don't.

11 Q. And her response to the first question
12 Ms. Carson wrote was, one, the legislature set the
13 rate so we don't have estimated data."do you see that?

14 A. I see that sentence.

15 Q. And that information was then forwarded on
16 to Ms. Carson at the regional office; is that right?

17 A. Yeah. I'm not sure of the chain of
18 addressees and the whole note has a -- is from Alfred
19 Matano, who if I'm reading the e-mail address
20 correctly, is in Wisconsin, to Pam Carson. And with
21 all the e-mails it's hard to say who was writing who
22 at that point.

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1 Q. If we go to 772, it appears to be a
2 response to HCFA's response for additional information
3 about state plan amendment 01-009, correct., that was

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4 sent to the Chicago regional office of HCFA?

5 A. I don't see that request for additional
6 information. That appears to be in response to a
7 letter requesting additional information dated
8 December 14th. Right.

9 Q. Does it appear that the first thing that
10 HCFA had asked for on page 1118 of Abbott Exhibit 772
11 was the documentation used to determine that the
12 proposed EAC is the best estimate of prices that
13 pharmacists in the state are generally and currently
14 paying for prescribed drugs, right?

15 A. Again, without having the request for
16 additional information, I can't be sure. But
17 generally it looks to be the information we had
18 requested.

19 Q. And then if you would look at the paragraph
20 below the bullets on page 118, it states, the second
21 paragraph or -- I'm sorry -- in that paragraph -- "In
22 addition, the EAC of other states in our region was

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1 considered to ensure equity in establishing the
2 Wisconsin price of prescription drugs. After careful
3 review of all of the information, the Wisconsin
4 legislature established the price paid for
5 prescription drugs to be AWP minus 11.25 percent,"
6 correct?

7 A. That statement is correct in the letter.
8 That's a correct reading.

9 Q. If you would go to Abbott Exhibit 773, this
10 is correspondence between Pam Carson in the Chicago

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11 regional office to Kimberly Howell of the CMS central
12 office, correct?

13 A. That appears to be correct.

14 Q. And then if we look at Bates page 10085,
15 the second page of the e-mail chain, it appears that
16 the first e-mail in this chain was dated March 22nd
17 '02 from Pam Carson, do you see that?

18 A. I do see that.

19 Q. She says "FYI, heads up. The state plan
20 coordinator from Wisconsin just called and he thinks
21 the powers that be in the Wisconsin are going to be
22 angry about your request. Stay tuned." Do you see

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1 that?

2 A. I see those sentences.

3 Q. Do you recall, Mr. Reed, becoming aware
4 that state legislatures were getting angry with HCFA
5 questioning the rates at which they established for
6 pharmacy reimbursement?

7 MR. WINGET-HERNANDEZ: Objection, form.

8 MS. MARTINEZ: Objection, form.

9 A. No. I don't recall that specifically.

10 Q. If we go back to the first page of this
11 exhibit, this is the second e-mail from the top. It
12 appears to be from Kimberly Howell dated March 25th
13 2002, 12:07. Do you see that?

14 A. I do.

15 Q. About halfway through the paragraph there's
16 a sentence that starts with "the request was not meant

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17 to question." Do you see that?

18 MS. MARTINEZ: I'm sorry. I got lost.
19 Where are you?

20 MR. TORBORG: It was an e-mail from
21 Kimberly -- Mr. Reed has got it.

22 THE WITNESS: That's on the first page.

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1 MS. MARTINEZ: Okay. Thank you.

2 BY MR. TORBORG:

3 Q. Ms. Howell wrote "The request was not meant
4 to question Wisconsin's legislature, but simply to
5 obtain whatever documentation was used to derive at
6 the decision that AWP minus 11.25 percent was their
7 best estimate. There are several prior instances
8 where the studies submitted by the state did not
9 support a proposed EAC. However, a further analysis
10 performed by the state to derive at the proposed EAC
11 in conjunction of the study supported the state best
12 estimate at the EAC level. I hope this information
13 addresses your concerns." Do you see that?

14 A. I do see those sentences.

15 Q. If you would go to Abbott Exhibit 774, that
16 appears to be a document from the State of Wisconsin
17 dated April 1st to Pamela Carson, Chicago regional
18 office, correct?

19 A. That looks to be correct.

20 Q. And then under 2 it appears as though HCFA
21 had requested the additional analysis that was used to
22 arrive at the AWP minus 11.25 percent. Do you see

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1 that?

2 A. I do see that.

3 Q. And he refers to an additional analysis
4 that was provided by the legislature fiscal bureau; is
5 that right?

6 A. That's the indication in the letter.

7 Q. Do you recall reviewing a document from the
8 Wisconsin legislature fiscal bureau?

9 A. No. I don't recall that.

10 Q. Do you recall that Drug Topics had done
11 around this time period a survey of approximately 500
12 employers to see how they were reimbursing drugs?

13 A. No. I don't recall that.

14 Q. Do you recall comparing what other third
15 party payors, how they were reimbursing drugs in
16 analyzing whether or not to approve state plans?

17 A. No, I don't.

18 Q. Do you think this would be a relevant
19 consideration?

20 MS. MARTINEZ: Objection, form.

21 A. Again, for us as -- to providing
22 information for the state, that might be helpful to

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1 the state. Like the OIG report itself, it would be
2 useful to know, but I'm not sure to what extent we
3 would use it to supercede, if you will, the
4 documentation the state presented in the state plan

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5 amendment.

6 Q. If we go to Abbott Exhibit 775, does this
7 appear to be a copy of the approval letter for this
8 state plan amendment that we've been talking about,
9 01-009, for Wisconsin?

10 MS. MARTINEZ: Objection to form.

11 A. This appears to be an internal control
12 copy.

13 Q. Do you recall if Wisconsin had provided you
14 any empirical evidence that AWP minus 11.25 percent
15 was their best estimate of the price at which
16 providers were currently and generally paying for
17 drugs?

18 MR. WINGET-HERNANDEZ: Objection, form.

19 A. No. I don't recall that. Do you have
20 other examples of this same exhibit or is it about
21 time for a break?

22 MR. TORBORG: That would be fine. Allow me

♀

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1 to collect my thoughts and see. I only have a couple
2 more minutes probably of questioning and then I'll be
3 done, I believe.

4 THE WITNESS: A couple more minutes?

5 MS. MARTINEZ: Right. And then I'll have
6 some questions.

7 MR. TORBORG: Okay.

8 THE WITNESS: Do you want to break now?

9 MR. TORBORG: Let's take a break and let me
10 collect exactly what I want to do at the end and then
11 we'll finish.

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12 THE VIDEOGRAPHER: This is the end of tape
13 4. Off the record at 3:55.

14 (Recess.)

15 THE VIDEOGRAPHER: This is the beginning of
16 tape 5 in the 30(b)(6) of the United States of America
17 by Mr. Reed. On the record at 4:16.

18 BY MR. TORBORG:

19 Q. Mr. Reed, I've asked you to take out Abbott
20 Exhibit 328. It bears the Bates numbers HHC 004-0188
21 through 90. You're familiar with this document,
22 right?

♀

DRAFT VERSION

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1 A. I've seen this document in my prior
2 deposition.

3 Q. And you've seen it prior to that as well?
4 Stated another way, your deposition was not the first
5 time you had seen this document?

6 A. I've seen a version of this document. I'm
7 not sure this particular document, at this point in
8 time document.

9 Q. Do you know when this particular document
10 was dated?

11 A. The final signed version?

12 Q. Well -- when did the drafting of this
13 document start, the substance that led to the final?

14 A. Yeah. I don't recall when it was first
15 started to be drafted, when it first started to be
16 drafted, rear.

17 Q. On the second page there's a section called

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18 analysis. The first paragraph states "In repeat
19 months there has been an increase in SPAs proposing to
20 change the reimbursement methodology (a listing of
21 these spas is attached.) Where there are a survey of
22 costs the findings generally show that these states'

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DRAFT VERSION

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1 reimbursement could have been reduced by a percentage
2 greater than the proposed AWP discount levels." Do
3 you see that?
4 A. Yes.
5 Q. You've an understanding of what that means?
6 A. Yes. I believe so.
7 Q. And could you tell me what that means?
8 A. Where there's a survey of cost for a given
9 state, if those were the findings upon which the
10 reimbursement would be based, it could have been by a
11 greater percentage than those proposed in the state
12 plan amendment.
13 Q. And the next sentence says the lesser level
14 of discount is generally the route of negotiations
15 that occur between the state and pharmacy
16 representatives after the survey results are known.
17 In other cases the state's legislature have responded
18 to the escalating costs of Medicaid drugs by enacting
19 legislation that increases the discount in the
20 ingredient cost or the dispensing fee of these drugs.
21 Legislation usually does not address why these rates
22 are the best estimates or reasonable. Do you see

♀

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1 that?

2 A. I see that part of the program.

3 Q. And was that consistent with your
4 experience at or around the time that this memorandum
5 was prepared?

6 A. I believe it was.

7 Q. In the next paragraph it says "It is
8 proving increasingly difficult to require the states
9 to establish payment rates in adherence to regulatory
10 requirements." Do you see that?

11 A. I see that sentence.

12 Q. Do you have an understanding of what that
13 means?

14 A. I believe I do.

15 Q. Okay. Can you tell us your understanding?

16 A. That the states themselves are having a
17 more difficult time establishing their payment rates
18 here.

19 Q. Is it saying -- what's it talking about
20 when it says difficult to require states to establish
21 payment rates in adherence to regulatory requirements?
22 What's being discussed there?

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DRAFT VERSION

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1 A. In this case it would be the EAC and a
2 dispensing fee.

3 Q. And why was it proving increasingly
4 difficult to require states to establish payment rates
5 in adherence to EAC and distribution fees?

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6 MS. MARTINEZ: Objection to form.

7 A. I think at this point in time that there
8 were, again, as we were becoming more aware of
9 differences between AWP's and the appropriate discounts
10 through the OIG and other information that might have
11 become available, states were having a more difficult
12 time basing their payment rates on those -- on that
13 data.

14 Q. Okay. And this was a phenomena that had
15 started prior to 2001; is that fair to say?

16 MS. MARTINEZ: Objection, form.

17 A. I don't know what time period that would
18 cover. I know what time period -- I mean, I know
19 approximately what time period this memo was
20 drafted -- or I'm sorry. I don't know what time
21 period it was drafted, but I know when it was done in
22 final. So I know that time frame.

♀

DRAFT VERSION

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1 Q. Well, we went through some documents
2 earlier today in the late '90s, 2000 and 2001 where
3 you were involved in discussions with the states where
4 you were trying to get them to provide documentation
5 to support the discount levels. And in a couple
6 instances you even pointed to OIG studies that would
7 call for a higher discount, correct?

8 A. I can remember at least in one instance I
9 reference OIG. This time in my e-mail note.

10 Q. And that's the type of thing that's being
11 talked about here, correct?

12 A. I believe so.

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13 Q. It says accordingly -- the memo continues
14 "Accordingly we believe in an analysis and acceptance
15 of other factors states are now using to establish
16 payment rates should be considered in looking they EAC
17 and the distribution fee." Do you have an
18 understanding what that means?

19 A. I do.

20 Q. Could you tell us what that means?

21 A. Again, there's a number of ways to do a
22 best estimate. Within the context of this memo, I

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DRAFT VERSION

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1 believe that this was for the final of this memo this
2 was where that responsibility was shifted for review
3 of the state plans from the regional office to the
4 central office. And within this sentence we were
5 looking for the bases to establish these payment
6 rates.

7 Q. What other factors were states using to
8 establish payment rates that CMS believed it should be
9 considering in looking at the EAC and the distribution
10 fee?

11 A. I think some of those factors are the ones
12 that resulted in the options in this paper.

13 Q. You're referring to the second page there?

14 A. I'm referring to the page after the page
15 you're referencing, correct.

16 Q. Bates page 190?

17 A. I'd like to mark -- this has been marked
18 already, but I'm going to mark it ask a new exhibit

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 19 number because I've learned that we have two Abbott
 20 Exhibit 487. So I'm going to mark that as a new
 21 exhibit number.

22 (Abbott Exhibit 776 was

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1 marked for identification.)

2 MS. MARTINEZ: Mr. Torborg, just so that
 3 you know, there is a production that you have that has
 4 this document with a Bates label number. I'm just
 5 letting you know that.

6 MR. TORBORG: Oh, okay.

7 MS. MARTINEZ: I think it might be HHD 173.
 8 It might be that container. But there's okay. It's
 9 just you're using a copy that was send by pdf.

10 MR. TORBORG: Okay.

11 BY MR. TORBORG:

12 Q. What we've marked as Exhibit 776 is an
 13 October 22nd memorandum from the director of the
 14 Center for Medicaid and State Operations to Thomas
 15 Scully and Rubin J. King-Shaw Jr. It's redacted.
 16 Eventually -- the memorandum appears signed by Dennis
 17 Smith and then a decision block is signed by Thomas
 18 Scully.

19 And let me ask you, Mr. Reed, if we go back
 20 to Abbott Exhibit 328, at the bottom of that page
 21 there's a recommendation there. Do you see that? And
 22 a spot to approve or disapprove, correct?

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DRAFT VERSION

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1 A. I'm sorry. Which exhibit are you looking
2 at?

3 Q. 328 at the very end.

4 A. I see that.

5 Q. What is that all about? Tell me what about
6 decision -- what's going on here.

7 A. Generally within CMS options papers would
8 be sent to either the center director or the
9 administrator or deputy administrator, whoever the
10 appropriate official would be, to present options for
11 a particular issue. In this case it was on the issues
12 here that I've described. And there may or may not be
13 a meeting on those issues. And after that point the
14 options would -- I'm sorry. The recommendation, more
15 specifically, would be approved or disapproved.
16 Sometimes memos were signed and sometimes they were
17 not.

18 Q. Why would there need to be a signature from
19 the administrator of HCFA to implement the options
20 that are set forth in Abbott Exhibit 776?

21 MS. MARTINEZ: Objection, form.

22 A. I'm sorry. I'm not sure I understand your

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DRAFT VERSION

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1 question.

2 Q. Why would there need to be -- why would Mr.
3 Scully, the administrator of HCFA, have to sign this
4 options paper as you've termed it?

5 A. I think that would be a decision of the CMS
6 officials involved in this. At that point it would be

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7 at what level those officials thought it appropriate
8 for signature.

9 Q. And did you believe it was appropriate for
10 signature, Mr. Reed?

11 A. Speaking as CMS?

12 Q. Yes.

13 A. Certainly speaking as CMS the administrator
14 has every -- can certainly make a decision.

15 Q. What was the decision being made here? And
16 why did Mr. Scully, the administrator of HCFA have to
17 sign off on the decision?

18 MS. MARTINEZ: Objection, form.

19 A. Again, it's a prerogative of either the
20 administrator or of the center director as to how they
21 want to decide any particular issue.

22 Q. And we've seen a number of approval memos

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DRAFT VERSION

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1 for state plan amendments today, correct?

2 A. We've seen a number of approvals.

3 Q. And those are generally signed by the
4 regional office after consultation with you and your
5 office, correct?

6 MS. MARTINEZ: Objection, form.

7 A. Either signed -- I'm sorry. How did you
8 say they were signed again?

9 Q. By the regional office, oftentimes after
10 consulting with you.

11 A. Generally so, correct. Or with the central
12 office, more specifically.

13 Q. Mr. Scully didn't have to sign those

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14 letters, did he, those decisions?

15 A. He certainly would reserve the right to
16 sign any and all documents on state plans. In those
17 cases that wasn't -- he had designated that further
18 down into the agency.

19 Q. Why was this one not a decision that was
20 delegated down into the agency?

21 A. Again, that's a prerogative of those
22 government officials if they're involved in it. It's

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DRAFT VERSION

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1 simply their decision as to how and at what level they
2 want this issue decided.

3 Q. And you wanted this decision decided at a
4 level above you; is that right?

5 MS. MARTINEZ: Objection, form.

6 A. CMS chose to have this decision made by the
7 administrator.

8 Q. Does that imply that the decisions and the
9 options set forth in this paper are important?

10 MS. MARTINEZ: Objection, form.

11 A. I think within the context of what their
12 recommendations and options are, that they were at a
13 level that the administrator chose to review.

14 Q. And do you know of any other decision in
15 the area of Medicaid prescription drugs from 1991
16 through 2003 besides this one where there was a
17 decision signed by the administrator of HCFA?

18 A. Any disapproval would be signed by the
19 administrator of HCFA.

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20 Q. How about any approval?

21 A. I don't think any approval that I can

22 recall would be signed by the administrator. An issue

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1 in relation to an approval could be brought to the
2 attention of the administrator in addition to options
3 papers if there's other types of communication within
4 CMS on deciding issues, issues, meetings, that type of
5 thing.

6 Q. Mr. Reed, was this options paper the draft
7 of which we see as Abbott Exhibit 328, and the final
8 redacted version we see as Abbott Exhibit 776, was
9 this something that was unique in the area of Medicaid
10 drug payments?

11 A. I'm sorry. Unique in which way?

12 Q. Was there anything else leak it? Options
13 papers setting forth ways to look at state plan
14 amendments that was signed by the administrator of
15 HCFA?

16 MR. AZORSKY: Objection to form.

17 MS. MARTINEZ: Objection, form.

18 A. Certainly, there are options papers that go
19 to the administrator on a number of issues. I think
20 you have to sort of look across the range of issues
21 that the administrator or the center director might
22 clues to either sign or raise to another level. I'm

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DRAFT VERSION

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1 not aware of another particular issue on pharmacy
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2 reimbursement where this type of memo went out,
3 although, as I said, individual issues on state plan
4 amendments or other issues can certainly be raised to
5 the administrator.

6 Q. Mr. Reed, to finish up, if you would take
7 out topic 14 again, in particular Ms. Martinez's
8 e-mail marked as Abbott Exhibit 757. The topic 14 as
9 modified by the United States states "From 1991 to
10 2001 with respect to Medicaid how CMS defined and
11 implemented 'estimated acquisition cost' and whether
12 in general, not in detail as to each state for each
13 year, CMS believed that the formula in the state plans
14 would result in payment for drugs at the estimated
15 acquisition costs of those drugs."

16 Mr. Reed, was there any point in time from
17 1991 through 2001 where CMS did not believe that the
18 formula in state plans would result in payment for
19 drugs at the estimated acquisition cost of those
20 drugs?

21 A. And I'm going back and testifying in
22 response to this topic 14 I can state that in general

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DRAFT VERSION

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1 CMS believed that the formula in the state plans would
2 result in payment for drugs at the estimated
3 acquisition cost of those drugs.

4 Q. Do you know of any instances with any state
5 for which the formula would not result in
6 reimbursement in accordance with estimated acquisition
7 cost?